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)O WE NEED A NEW LOOK IT ARBITRABILITY?

ome Questions for Discussion

THE DECISIONS of the United States Supreme Court in three labor arbitration cases on June 20,[1] and more particularly, in the wo involving arbitrability, have caused rejoicing in some quarters, onsternation in others. Understandably, labor union representatives elcomed the rebuke to the Cutler-Hammer doctrine,[2] which was hat "if the meaning of the provision of the contract sought to be rbitrated is beyond dispute there cannot be anything to arbitrate nd the contract cannot be said to provide for arbitration." Applying his doctrine, lower courts had often barred arbitration of claims hought to be "baseless." Many management representatives, on the ther hand, deplored the Supreme Court's decisions. If a grievance s made arbitrable merely by the claimant's assertion, however frivol- us, that a question of contract interpretation is involved, they said, t might be necessary in the future to write more restrictive arbitra- ion clauses.

The resolution to pay closer attention to the arbitration clause nd make it express the will of the parties more accurately is, of ourse, laudable. And it is of little concern to courts, arbitrators or rbitration administering agencies whether parties use broad arbitra- ion clauses or narrow ones. Either is consistent with the principle f voluntary arbitration.

It is of concern, however, that any party should be so distressed t having to arbitrate, rather than litigate, arbitrability questions that he would feel impelled to rewrite an otherwise satisfactory arbitration lause. This alone is a circumstance justifying a new look at arbitra- ility. For if it is true to any extent that arbitrators are not to be

1. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).
2. *Int'l Ass'n of Machinists v. Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S. 2d 317, aff'd 297 N.Y. 519, 74 N.E. 2d 464 (1947).

trusted to interpret contracts on questions involving their own jurisdiction, to that extent the integrity of the voluntary arbitration system is affected. This throws a new and great responsibility upon individual arbitrators.

Ideally, a dispute over the arbitrability of a grievance should be resolved purely as a matter of contract interpretation, without regard to whether the company or the union was correct on the subject matter of the grievance. The difficulty is, however, that it is frequently not possible to say whether the grievance is arbitrable without at least some consideration of the basic dispute. A case recently reported in the American Arbitration Association's *Summary of Labor Arbitration Awards* illustrates the problem. The arbitration clause covered discipline cases generally, but specifically excluded arbitration of discharge for refusal of the employee to obey a work order within his classification. When the union demanded arbitration of a discharge, the employer asserted this exclusion in support of his contention that the grievance was not arbitrable.

Clearly, neither a judge nor an arbitrator could decide whether the grievance was arbitrable without first determining whether the work order the employee had been given *was* within his classification. And while studying the facts for the purpose of determining arbitrability, the judge or arbitrator could perhaps not help forming an opinion as to whether the grievant deserved to be dismissed. Nevertheless, it would be wrong to let his judgment on the *merits* influence the decision on the threshold question of arbitrability. Only after a finding that the work order was *not* within the employee's job classification, could the question of just cause for discharge be dealt with properly.

The distinction between a *prima facie* showing, necessary for determination of arbitrability, and a more complete showing, necessary to establish one's case on the merits, was well expressed by the United States Court of Appeals for the Second Circuit in the *Sperry Gyroscope* case.[3] "Determination of arbitrability only requires that the moving party produce evidence which tends to establish his claim," the court wrote. "Once the tendency of the evidence to support the claim has been established, it is then the function of the arbitrator to weigh all the evidence and then to determine whether the contract was broken."

Arbitrators, too, understand the need to determine arbitrability

3. 251 F. 2d 133 (Second Circuit, 1957).

questions as separate problems of contract interpretation, uninfluenced by their views of whether the grievance has merit. G. Allan Dash, for instance, recently determined the issue of arbitrability of a grievance in which the union alleged that the employer had not provided accident insurance as required by the contract. "It is necessary to look to the record to decide whether this allegation has any substance so as to permit the union to proceed with its claims as to the merits of its grievance," he wrote. Having found "*potential* support" (emphasis supplied), he directed that the grievance be arbitrated on its merits.

It would be idle to assert that neither courts nor arbitrators have ever disregarded the distinctions expressed by the court or the arbitrator quoted above. Courts have been known to bar arbitration of grievances not so much because the disputes fell outside the scope of arbitration clauses, but rather because the judges believed there was no merit to the union's claim. And arbitrators have occasionally been known to declare grievances arbitrable *only* because they were inclined to deny the grievances on the merits anyway. Both errors represent failure to interpret arbitration clauses in accordance with the original intentions of the parties.

The tendency of some lower courts to intrude upon the merits of cases—an area reserved for arbitrators—has now been curbed by the Supreme Court. If any correction of faults on the part of arbitrators is to take place, it will have to be accomplished not by review from above, for arbitrators are the final judges of factual matters before them, but by their own self-restraint. Such a remedial course is particularly necessary now, because employers will not have a choice of forums for determining arbitrability to the same extent that they had such a choice in the past. The responsibility is now on the arbitrators more than ever to write decisions on arbitrability that are free from any suspicion that they are pre-disposed to find almost any case arbitrable.

Before raising specific questions for discussion, it might perhaps be well to avoid misunderstanding about the scope of the problem. If a statistical analysis of arbitrators' decisions in cases involving arbitrability shows that they have held most disputes arbitrable, it is because they *were* arbitrable. There are probably as many frivolous assertions of non-arbitrability as there are baseless claims that a contract has been violated. When an employer states that a particular discharge was for "just cause," for instance, and that, as he has the right to discharge for cause, the grievance is not arbitrable, he is

asking the arbitrator to accept as a fact the very matter that must be proven. Those who read many arbitration awards could provide numerous other examples of situations where the assertion of non-arbitrability is merely another way of stating the company's appraisal of the merits.

Nevertheless, it may be questioned whether, in some situations, employers are not compelled to justify actions before arbitrators on matters that were never intended to be subject to the arbitration clause. For instance, when a contract gives the employer the right to discharge a probationary employee for any reason without a showing of cause, and where an arbitrator acknowledges that he has no choice but to deny a grievance protesting such a discharge without even bothering to hear testimony as to the circumstances, can it really be said that the grievance was arbitrable? In this case, where the employer's defense was non-arbitrability, would it not have been more in keeping with the original intention of the parties to have denied the grievance for lack of jurisdiction on the arbitrator's part, rather than to have found that the dispute was arbitrable but deniable on the merits? True, a decision on the merits may be more acceptable to the grievant, who may not understand nice distinctions and "technicalities." But these technicalities are important to the collective bargaining relationship, and they should be preserved by arbitrators.

In a recently published case, an arbitrator expressed the view that "almost any grievance or dispute concerning working conditions and the employment relationship may be arbitrable, even though the answer may be crystal clear." One may question whether the generalization is not too broad, even under a broad arbitration clause. Is there no way to bar consideration of the merits of a claim that an arbitrator (as distinct from a judge who might not have the arbitrator's insight into industrial relations) would find utterly baseless? As Mr. Dash pointed out in the sentence quoted above, the grievance before him was made arbitrable by the union's showing of "potential support" for its claim. The implication may be drawn that if there had been no such *prima facie* showing, the employer's contention of non-arbitrability could have been upheld. This approach, consistent with the quoted one of the Second Circuit, is surely more realistic than the view that it requires only the claimant's assertion of arbitrability to establish the arbitrator's authority to rule on the merits. Furthermore, as Professor Paul R. Hays observed in a perceptive paper read before the American Bar Association, Section on Labor

Relations Law, on August 30, 1960,[4] "if . . . an arbitrator has the power to decide a question to which both the agreement and the evidence establish that there is only one answer, he has the power to give the other answer." In other words, when a matter is before the arbitrator on the merits, it becomes part of what has been called the "arbitration risk." And if a matter is not a bona fide dispute, the employer should not be denied the opportunity to refuse to take that risk.

But most important of all, is there not a need for better written and more persuasive arbitrability decisions, clearly based on contract language? An arbitrator may believe that it does not matter how casually he dismisses the arbitrability issue because he is, in any event, going to deny the grievance on the merits. He may even believe that an adverse decision on the merits themselves will give the grievant a feeling of having had his "day in court." But these considerations are secondary for those concerned with the long run future of arbitration. The arbitrator can manifest his concern with that future by performing the judicial function for which he was selected, upholding the integrity of arbitration clauses, and making arbitration more acceptable to the parties. For it is they, in the final analysis, who always have free choice to decide whether or not to resort to this method of settling disputes. If the climate is favorable, they will usually reach a favorable decision.

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4. Published in the November 1960 issue of *Columbia Law Review*, p. 907-925.

UNINSURED MOTORIST COVERAGE:
A Guide to MVAIC* and Arbitration

by Gerald Aksen**

I. Introduction

The New York compulsory automobile insurance law of 1956 was only partially successful in its attempt to secure protection against loss arising from personal injury or death in motor vehicle accidents with uninsured motorists. It became evident that the Act was insufficient to provide adequate coverage in many types of situations.

As the Legislature has stated:[1] ". . . the motor vehicle financial security act as enacted in nineteen hundred fifty-six, which requires the owner of a motor vehicle to furnish proof of financial security as a condition to registration, fails to accomplish its full purpose of securing to innocent victims of motor vehicle accidents recompense for the injury and financial loss inflicted upon them, in that the act makes no provision for the payment of loss on account of injury to or death of persons who, through no fault of their own, were involved in motor vehicle accidents caused by 1) uninsured motor vehicles registered in a state other than New York, 2) unidentified motor vehicles which leave the scene of the accident, 3) motor vehicles registered in this state as to which at the time of the accident there was not in effect a policy of liability insurance, 4) stolen motor vehicles, 5) motor vehicles operated without the permission of the owner, 6) insured motor vehicles where the insurer disclaims liability or denies coverage and 7) unregistered motor vehicles. The legislature determines that it is a matter of grave concern that such innocent victims are not recompensed for the injury and financial loss inflicted upon them and that the public interest can best be served by closing such gaps in the motor vehicle financial security act through

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* MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION.

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the incorporation and operation of the motor vehicle accident indemnification corporation."

To remedy these defects the Legislature enacted Article 17-A[2] of the Insurance Law which in turn created the Motor Vehicle Accident Indemnification Corporation (hereinafter called "MVAIC" or "The Corporation"). The MVAIC is a non-profit corporation, of which all insurance companies authorized to write motor vehicle liability insurance in New York are members. It functions somewhat like an insurance company, in that the Corporation assumes the obligation of paying those claims which are covered by the new law.

The funds to pay claims and operating expenses of the Corporation come from assessments levied against the member insurance companies and are collected annually in advance.

The Corporation was empowered to take such measures as were necessary to administer the new MVAIC Law. One of the measures adopted by the Corporation was to provide for arbitration of disputed claims in certain areas.[3]

Both the MVAIC Law and arbitration of uninsured motorist claims thereunder being new legal developments,[4] this paper collates the court cases, and summarizes the pertinent arbitration procedures, to show how the law has been interpreted and applied.

II. Persons Afforded Coverage

Two classes of claimants were created under the MVAIC Law: "Qualified persons"[5] and "Insured"[6] persons. The first category consists of residents of New York State who are not protected by automobile liability insurance, or residents of another state which has a similar program of automobile insurance coverage.

The second category, the insured person, obtains his rights and obligations not merely from the statute itself, but from a written Endorsement found in every automobile liability insurance policy issued

1. N.Y. INSURANCE LAW § 600 (2) "Declaration of Purpose."
2. Article added by L. 1958, c. 759, § 2, eff. Jan. 1, 1959.
3. NEW YORK AUTOMOBILE ACCIDENT INDEMNIFICATION ENDORSEMENT (hereinafter cited as ENDORSEMENT) "INSURING AGREEMENTS" § 1, and "CONDITIONS" § 6; MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION, YOUR PROTECTION AGAINST UNINSURED MOTORISTS IN NEW YORK.
4. The American Arbitration Association has administered arbitration of accident claims under uninsured motorist endorsements of private insurance carriers since 1956.
5. N.Y. INSURANCE LAW § 601 (b). (See note 7 infra. for text).
6. N.Y. INSURANCE LAW § 601 (i).

in the State of New York. Known as the "New York Automobile Accident Indemnification Endorsement," it defines the terms, conditions and duties of the insured person desiring to make a claim against the Corporation when involved in an accident with an uninsured motorist. Because of the complexities in the two categories, they will for the most part have to be dealt with separately for purposes of clarity.

a) The "Qualified person"[7]

By providing for a "qualified person" the Legislature sought to effect a broad coverage that would protect even the innocent pedestrian who is not a car owner and is involved in an accident with a negligent uninsured motorist. The law as written is, indeed, broad in scope, and there are few cases to date to indicate just how far this protection will extend. Take the accident which does *not* involve another car. For instance, a thief steals a car, takes his girl friend for a "joy ride," and crashes into a telephone pole.[8] Is there any coverage for the injured girl, who may or may not have known that the auto was stolen? The thief cannot seek payment from the Corporation because he is not an "innocent victim"[9] as required by the law. The same reasoning would probably apply to the girl friend were it shown that she had knowledge of the fact that the car was stolen. However, the law seems broad enough to extend coverage to the girl passenger, innocently involved in the escapade—even though she is not covered by any insurance endorsement.

1. Exclusions

An owner of an uninsured automobile, or his wife when a passenger in such a vehicle, or a person who at the time of the accident

7. "Qualified person" means "1) a resident of this state, other than an insured or the owner of an uninsured motor vehicle and his spouse when a passenger in such vehicle, or his legal representative, or (2) a resident of another state, territory or federal district of the United States or province of the Dominion of Canada, or foreign country, in which recourse is afforded, to residents of this state, of substantially similar character to that provided for by this article, or his legal representative." (See note 5 supra.)
8. The automobile is uninsured when driven by a thief because it was being operated without the consent of the owner. Any passenger in the car is then involved in an accident with an uninsured motorist. Caveat: such passenger may be either a qualified or an insured person, depending on whether there is any insurance or an automobile owned by the passenger or his family.
9. In the "Declaration of Purpose" the Legislature expresses its grave concern that "innocent victims" may not be recompensed for their injuries. See text supra.

was operating an uninsured motor vehicle is excluded from the benefits of the new law.[10]

A non-resident would also be ineligible to make claim against the Corporation unless the laws of his state would grant substantially the same rights to New York residents under similar circumstances.[11]

2. Procedure

A qualified person must file an intention to make a claim against MVAIC which should be in affidavit form setting forth "your intention to make a claim, the names of the operator and owner of the uninsured motor vehicle, if known, and the facts in support of your claim."[12]

The term "qualified person" is defined in the statute and a claimant must set forth sufficient facts to bring himself within the purview of that category.[13] Where a petitioner failed to allege that she was a resident of New York State and that the automobile in which she was a passenger was insured she was not a qualified person and thus barred from bringing an action against the Corporation.[14] The proof required in showing that one is qualified under the Act cannot be evidenced by mere hearsay testimony.[15]

If the injured claimant is in fact a qualified person seeking indemnification for an injury caused by a hit-and-run motorist, he must obtain leave to bring an action against the MVAIC in the Supreme Court.[16] The Insurance Law provides for the court to proceed on such an application in a summary manner.[17] Permission to institute an action against the Corporation can be granted only to a qualified person. Insured persons must follow the remedies specified for them in the Uninsured Motorist Endorsement.[18]

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10. N.Y. INSURANCE LAW §§ 601 (b) and 611 (b).
11. Ibid.
12. MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION, YOUR PROTECTION AGAINST UNINSURED MOTORISTS IN NEW YORK.
13. N.Y. INSURANCE LAW §§ 608 and 611.
14. *Bonavisa v. MVAIC,* 21 Misc.2d 963, 198 N.Y.S.2d 332 (Sup. Ct. 1960). However, the court said these deficiencies could be cured by an amended petition.
15. *Urkowitz v. MVAIC,* 21 Misc.2d 586, 194 N.Y.S.2d 241 (Sup. Ct. 1959).
16. N.Y. INSURANCE LAW § 618. *Bruno v. MVAIC,* N.Y.L.J., July 5, 1960, p. 6 col. 4.
17. N.Y. INSURANCE LAW § 618. *La Paz v. MVAIC,* N.Y.L.J., July 1, 1960, p. 5 col. 7; *Howitt v. MVAIC,* 21 Misc.2d 694, 197 N.Y.S.2d 273 (Sup. Ct. 1960).
18. *Powell v. MVAIC,* N.Y.L.J., June 23, 1960, p. 8 col. 4.

3. Time Limits

In the ordinary case the qualified person must file his intention to make a claim against the Corporation within ninety days of the accident.[19] Failure to comply may result in a loss of the right to institute a claim.[20] Lack of knowledge of this statutory time limit has brought many harsh results to potential claimants in New York. Many parties and their attorneys, unfamiliar with the new law, have failed to file notice of their claims within the prescribed time, and the result, in many instances, was a foreclosure of all rights under the Act.[21]

The courts have been fairly strict in upholding this time limit provision and in interpreting any possible excuses for late filing allowed under the Law. The judicial attitude is that the statutory remedy clearly sets forth the basis for excusing a delay in complying with the strict ninety day period for filing a notice of claim.

Under the terms of the statute, the types of disability which may excuse late filing are limited to physical and mental incapacity, death and infancy.[22] One court said: "Although the disposition herein may appear harsh under circumstances where a salutary advance in the law provides a remedy to injured victims of uninsured drivers, the enlargement of the prescribed period to file a notice of claim as a condition precedent to the exercise of this remedy is a matter exclusively for the Legislature and not for the courts."[23] It must be the disability itself which causes the delay in filing.[24] In the *Labanowski* case the claimant was injured on December 29, 1959. He retained counsel in January of 1960, and it was presumed the motor vehicle involved was insured because it had license plates. On April 15, 1960 it was discovered that the insurance coverage had lapsed. Some 17 days had expired since the end of the ninety day period and the court

19. N.Y. INSURANCE LAW § 608 (a).
20. See e.g., *Tyler v. Gammon,* 21 Misc.2d 546, 196 N.Y.S.2d 160 (Sup. Ct. 1959); *Ortiz v. Pabon,* 22 Misc.2d 241, 198 N.Y.S.2d 652 (Sup. Ct. 1960); *Danielson v. MVAIC,* 22 Misc.2d 943, 196 N.Y.S.2d 760 (Sup. Ct. 1960); *Pressley v. MVAIC,* N.Y.L.J., March 9, 1960, p. 12 col. 5.
21. Ibid.
22. N.Y. INSURANCE LAW § 608 (c).
23. *Labanowski v. MVAIC,* N.Y.L.J., May 11, 1960, p. 13 col. 6, motion to dismiss appeal granted, N.Y.L.J. Oct. 14, 1960, p. 13 col. 4 (App. Div. 1st Dept.).
24. The statute says: "where the qualified person is an infant or is mentally or physically incapacitated or is deceased, *and by reason of such disability* or death is prevented from filing . . . a court . . . may . . . grant leave to file the affidavit." [Emphasis supplied] N.Y. INSURANCE LAW § 608 (c).

held the necessary filing was not prevented "by reason of applicant's physical disability."[25]

Failure of an infant's attorney to file within the time allowed because he was not aware of the statute will not be an excuse since the infancy did not cause the delay.[26]

There seems to be some confusion as to how a late filing will be excused for infants even under statutory aegis. For instance, in *Sullivan v. MVAIC*,[27] where an infant failed to file within ninety days and was unable to advance any meritorious reason for said default, the Appellate Division, First Department, held that his error was fatal.

But in another fact pattern which is almost identical, the notice of intention to file a claim being made by an infant after the expiration of the ninety day period, the Appellate Division, Second Department reversed an order of the Supreme Court, and permitted late filing.[28] The Appellate Court said that in a proper exercise of discretion the motion to file late should have been granted. However, if infancy alone is not sufficient to justify a late filing, then the *Frey* case would seem to indicate a reluctance on the part of the court to hold infants to the letter of the statute.

In accord with the latter holding, the court in *Acevedo v. MVAIC* said: "In view of the fact that petitioner herein is an infant six years of age, it follows as a matter of common sense and law that this disability prevented him from filing a timely notice."[29]

However, with adults the courts are agreed that the delay in filing pursuant to section 608 of the Insurance law must be due to a physical or mental disability of the petitioner.[30] For example, a physical disability not being present, filing notice of intention to make a claim 17 days late was held a bar to an adult claimant in the *Labanowski* case (supra). However, a court permitted filing of a claim by an infant even though the latter's application was also made 17 days after expiration of the 90 day statutory period for filing.[31]

To show further the obvious complications resulting from such

25. See note 23 supra.
26. *Rodriquez v. MVAIC,* 19 Misc.2d 200, 191 N.Y.S.2d 866 (Sup. Ct. 1959).
27. 18 Misc.2d 961, 190 N.Y.S.2d 33 (Sup. Ct. 1959); aff'd per cur., 11 App. Div.2d 675, 202 N.Y.S.2d 414 (1st Dept. 1960).
28. *Frey v. MVAIC,* 204 N.Y.S.2d 959 (2d Dept. 1960).
29. N.Y.L.J., May 11, 1960, p. 14 col. 2.
30. *Smith v. MVAIC,* N.Y.L.J., June 17, 1960, p. 13 col. 7; *Lanteri v. MVAIC,* N.Y.L.J., June 6 ,1960, p. 14 col. 4.
31. *Lavin v. MVAIC,* 23 Misc.2d 126, 201 N.Y.S.2d 471 (Sup. Ct. 1960).

rigid application of the statute, one need merely look to *Fogel v. MVAIC*,[32] where a mother and infant child were injured in the same accident by an uninsured motorist. They both sought leave to file notice of claim against the Corporation beyond the statutory 90 day time limit. The court held the mother was barred because "The Legislature prescribed the limit of time within which relief may be sought, and the court is not empowered to enlarge that period. . . . However, in the exercise of its discretion, that part of the motion pertaining to the infant is granted, and a late filing is herewith permitted."

Should the court itself wish to extend the 90 day time limit, it may do so only if certain statutory[33] requirements have been met: when proof is shown that it was not reasonably possible to file within the 90 day period, *and* provided application to the court is made within *120* days of the accident.[34]

This 120 day period within which the courts have discretion to excuse late filing of notice of intention to file a claim has been compared to the language of "sec. 50-e subd. 5, of the General Municipal Law, which has been construed to withhold from the court the discretion to entertain an application after the time fixed in the statute has gone by. . . ."[35] It follows that a court has no alternative but to deny any application made after 120 days have expired, however much it might otherwise be disposed to give it favorable consideration.[36]

It is of interest to note at this point that the accident in *Fogel v. MVAIC*[37] occurred on November 14, 1959 and the notice of motion was served on Monday, March 14, 1960 or *121* days later. The 120 day statutory period within which the court had discretion to extend the 90 day period had expired on Sunday, March 13, 1960. However, the court held service could not properly be made on Sunday and extended the time one day to make timely service of the notice of motion, so as to have jurisdiction to hear the motion.

The dilemma presented by these statutory time limits in the new law induced Judge Hofstadter to say: "The conclusion so commanded by the law prompts the court to suggest the possible need

32. N.Y.L.J., June 6, 1960, p. 14 col. 4.
33. N.Y. INSURANCE LAW § 608 (c).
34. *Johnson v. MVAIC*, N.Y.L.J., June 2, 1960, p. 13 col. 5.
35. *Danielson v. MVAIC*, 22 Misc.2d 943, 196 N.Y.S.2d 760 (Sup. Ct. 1960).
36. *Jennings, Jr. v. MVAIC*, N.Y.L.J., June 1, 1960, p. 15 col. 4; *Stark v. Corbett*, N.Y.L.J., Aug. 3, 1960, p. 5 col. 5.
37. See note 32 supra.

for study by the Legislature of the question whether, in the light of experience, the enlargement of the periods of 90 and 120 days respectively now prescribed would not be more conducive to the attainment of the purposes of the law."[38]

It is also possible for the qualified person who, through disability, has failed to file notice within the required 90 days to apply to the MVAIC itself for permission to file late. The Corporation may accept filing after the expiration of the applicable period, if accompanied by satisfactory proof of the facts which caused the delay and that it was not reasonably possible to file within the applicable period and that the affidavit was filed as soon as was reasonably possible.[39] This is an especially important avenue of relief because the Corporation is not restricted to a period of 120 days, as is the court. Therefore it is advisable to request such relief directly from the Corporation. The Board of Directors holds special meetings to consider such applications and, in the past, where the above-mentioned requisites have been met, late filing has been permitted.[40]

b) *The Insured Person*

If a claimant or some relative in his household owns an automobile registered in the State of New York, or was riding in a car registered in New York, he is an insured person for the purpose of making a claim against the MVAIC.[41] The new law provides that all policies of automobile liability insurance issued after January 1, 1959 must contain an uninsured motorist endorsement[42] which affords protection to the named insured, his wife, and relatives of either while members of the same household as well as guest passengers and others using the car with the consent of the insured.[43]

The distinction between a qualified person and an insured person is important because the procedures of initiating the claim are different depending upon which category one is in. With the qualified person, his rights accrue directly from the statute; however, the insured claimant derives his rights and obligations from a written contract, called "The New York Automobile Accident Indemnification Endorsement." This Endorsement is found in every liability

38. See note 35 supra.
39. N.Y. INSURANCE LAW § 608 (c).
40. Interview with Mr. Thomas O'Boyle, Manager, MVAIC on Sept. 9, 1960.
41. See note 12 supra.
42. N.Y. INSURANCE LAW § 167 (2) (a).
43. ENDORSEMENT, Definitions, § II (a), (1), (2), & (3).

insurance policy issued by all insurance carriers in the State of New York. Even if this Endorsement is omitted from an automobile liability policy issued after January 1, 1959, the Insurance Law provides that every such policy shall be considered to contain the Endorsement.[44]

1. Exclusions

The Endorsement contains provisions for certain situations wherein there is no coverage.[45] They are generally (1) where injury occurs to an insured who was operating an automobile in violation of an order of suspension or revocation, or (2) where the insured settles his claim with the wrongdoer or prosecutes the claim to judgment without the written consent of the MVAIC, or (3) where the coverage, in any way, benefits any workmen's compensation or disability benefit insurer, or self-insurer, or (4) where the accident occurs outside of the State of New York.[46]

2. Procedure

The Endorsement itself constitutes the agreement between the insured person and the Corporation, and is in consideration of payment of the premium. Just as the qualified person must follow the procedures outlined by the Statute, the insured person must comply with the steps and conditions precedent found in the Endorsement.

When an insured person is the victim of an accident with an uninsured motorist, his procedure would be to notify MVAIC in writing, giving the particulars of the accident, the injuries sustained, and the name of the liability insurance carrier. It would also be proper to notify the insurance company which is insuring the car he was in at the time of the accident.[47]

All claims by an insured person must be settled directly with the MVAIC. Negotiation with the insured's liability carrier is no longer possible, even though the Uninsured Motorist Endorsement premium is paid directly to the insurance carrier. However, should an insurance company mistakenly take affirmative steps such as instituting investigation of the claim, and thereafter deny liability because the MVAIC is found to be the proper party, it may be held in as a defendant, especially where delay on the part of the insurer in notifying

44. See note 42 supra.
45. ENDORSEMENT, Exclusions (a), (b) & (c).
46. Id., Definitions, § III.
47. See note 12 supra.

its insured that it is not the proper party extends beyond the 90 day time limit for an insured claimant to present his claim to the Corporation.[48]

It is expected that the claimant will cooperate fully in supplying particulars of the accident as well as names of any witnesses and the nature and extent of the injury sustained. In addition, he may be required to answer questions under oath or submit to a physical examination by a physician chosen by the Corporation.[49] As a matter of fact, the afore-mentioned requisites must be complied with before the claimant can institute arbitration against the Corporation.[50]

3. Time Limits

As the qualified person has a 90 day time limit within which to file notice of his claim, the insured person must also present his proof of claim within ninety days or as soon as is practicable.[51] Failure to notify the Corporation within this time limit will result in the claim being denied unless it can be proved that the Corporation was notified as soon as practicable.[52] The Statute and the Endorsement are both silent as to where the insured claimant would seek to prove that his claim, when filed after the expiration of 90 days, was nevertheless made as soon as was practicable.

The Corporation has established a procedure whereby the insured may make such late application to its Board of Directors. If the filing is found to have been made as soon as was practicable and there is a valid excuse for being unable to file on time, the application will be granted. However, it may also be possible to apply to the Supreme Court for a motion to compel arbitration against the Corporation under the provisions of Sec. 1450 of the New York Civil Practice Act. If the court finds that there were circumstances making failure to file the claim within the time required reasonable, and that the filing was done as soon as practicable thereafter, it will grant the motion to compel arbitration.[53]

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48. *Gallagher v. Government Employees Ins. Co.*, N.Y.L.J., Sept. 8, 1960, p. 13 col. 7.
49. ENDORSEMENT, Conditions § 3. *MVAIC v. De Freitas*, N.Y.L.J., May 6, 1960, p. 13 col. 2. Claimant is entitled to receive a copy of any physical examination report made by the Corporation's doctor. *Dunn v. Williams*, 203 N.Y.S.2d 601 (Sup. Ct. 1960).
50. ENDORSEMENT, Conditions § 9. *Stroud v. MVAIC*, N.Y.L.J., Sept. 30, 1960, p. 14 col. 1.
51. Id., Conditions § 3. See also note 12 supra.
52. This means "as soon as practicable after discovery of the uninsured status." *Brown v. MVAIC*, N.Y.L.J., Aug. 4, 1960, p. 6 col. 5.
53. *Brown v. MVAIC*, see note 52 supra.

III. Uninsured By Disclaimer

In its overall attempt to afford coverage to all possible situations involving accidents with uninsured motorists, the Insurance Law has provided for the situation where an accident is caused by a motorist who is insured at the time of the accident, but whose insurer later disclaims liability or denies coverage altogether.[54]

Prior to enactment of the MVAIC Law the innocent victim in such a situation was left without any type of insurance coverage because the accident was not caused by a person who was "uninsured at the time of the accident."[55]

The law now permits the injured person to file notice of intention to file a claim against the MVAIC when such disclaimer is made, provided the filing is within ten days after the written notice of disclaimer.[56] Since it would be impossible under certain circumstances to predict in advance when an insurer is going to disclaim, the 90 day period within which one must file a claim against the Corporation does not apply to the situation of disclaimer. The fact that the accident was caused by an *insured* motorist lulls the potential claimant into a sense of security, as he believes he is barred only by the regular statute of limitations applicable in bringing any claim against a negligent person.[57] However, should the injured party sue the in-

54. N.Y. INSURANCE LAW § 600 (2) (6).

55. See e.g., *Berman v. Travelers Indem. Co.*, 11 Misc.2d 291, 171 N.Y.S.2d 869 (Sup. Ct. 1958); *Daniels v. Statewide Ins. Co.*, N.Y.L.J., May 5, 1960, p. 15 col. 1.

56. N.Y. INSURANCE LAW § 608 (c). There are conceivably some fact patterns where an innocent victim will be unable to take advantage of this additional ten-day period within which disclaimer or denial of coverage may be claimed. E.g., suppose claimant A is injured through the negligence of another motorist, B, whose insurance policy expired on the day prior to the accident. B, mistakenly and in good faith informs A that he, B, is insured and even furnishes A with the name of the insurance carrier involved. Some 91 days later A is informed by B's insurer that they are denying coverage because the policy had lapsed the day before the accident. Query: does the 10 day notice provision applicable to disclaimer or denial of coverage now come into force when, in fact, B was uninsured at the time of the accident? MVAIC takes the position that if a person is involved in an accident with an uninsured motorist he must file notice of intention to file his claim against the Corporation within 90 days from the date of the accident. See *Kaplan v. Brown*, 21 Misc.2d 863, 197 N.Y.S.2d 749 (Sup. Ct. 1960) and *MVAIC v. McGuigan*, N.Y.L.J., Oct. 6, 1960, p. 12 col. 2, where the court characterized this as lapsed coverage rather than disclaimed coverage.

57. For the statute of limitations applicable to uninsured motorist endorsements issued prior to the MVAIC Endorsement, see *Matter of Ceccarelli*, 204 N.Y.S.2d 550 (Sup. Ct. 1960). But cf. *Security Insurance Co. of New Haven, Conn. v. Rogers*, N.Y.L.J., Oct. 4, 1960, p. 14 col. 2.

sured person, and the latter refuse to cooperate with his insurer, it is very likely that the insurer will disclaim under the terms of the insurance contract. Obviously all of this may take place subsequent to the 90 day time limit normally required to make claim against the Corporation. Therefore the time to make claim against the MVAIC in case of disclaimer is within 10 days from the date of written notice of disclaimer.

IV. Accident With Hit-and-Run Driver

Another of the prime areas where compulsory insurance was inadequate to provide protection occurred when an innocent person was injured by a "hit-and-run" automobile.

The term "hit-and-run" is defined both in the Statute[58] and in the Endorsement[59] as meaning one that causes bodily injury by physical contact with the claimant or the automobile which he was "occupying"[60] at the time of the accident, provided the following conditions exist: (1) the identity of the owner of the hit-and-run car cannot be ascertained[61] and (2) the automobile which the claimant was occupying at the time of the accident is made available to the MVAIC[62] and (3) the accident is reported to the authorities within 24 hours after its occurrence.

In order to prevent fraudulent claims, this additional 24 hour time limitation has been placed upon an accident with the so called hit-and-run driver. The Legislature obviously felt that such an occurrence would be reported to a public official almost immediately. As a result, this type of accident must be reported to the police, a justice of the peace, a judge, or the Motor Vehicle Commission, within 24 hours.[63] *This requirement applies to both qualified and insured claimants.* Failure to make such a report will result in the claim be-

58. N.Y. INSURANCE LAW § 617.
59. ENDORSEMENT, Definitions § II (c).
60. "The word 'occupying' means in or upon or entering into or alighting from." N.Y. INSURANCE LAW § 617 and ENDORSEMENT, Insuring Agreements, II (d).
61. The statute says: ". . . the identity of the motor vehicle *and* of the operator *and* owner thereof cannot be ascertained . . ." while the Endorsement merely requires that "there cannot be ascertained the identity of either the operator *or* the owner . . ." N.Y. INSURANCE LAW § 618 (a) and ENDORSEMENT, INSURING AGREEMENTS § II (c).
62. This requirement is found only in the Endorsement and not in the statute because a qualified person would not have an automobile to present for inspection.
63. ENDORSEMENT, Definitions § II (c) (2); N.Y. INSURANCE LAW § 608 (b).

ing denied, unless the claimant can show it was not reasonably possible to make it and, in addition, that he did make the report as soon as reasonably possible.

In *Bonavisa v. MVAIC,*[64] the report was made to the police department three days after an accident with a hit-and-run driver. The court denied the application for permission to sue MVAIC, saying, "In a statute such as this, the very short time provided is entirely reasonable. It is a common and usual course of conduct to report to the police incidents of the character which would give rise to a cause of action" under the provisions of Article 17A of the Insurance Law.

On the other hand, the amount of proof that is required when one *has* given notice within 24 hours need be slight. Where a petitioner alleged that he gave notice to a police officer at the time of the accident, even though no such police report was on record, the court held a technical compliance with the 24 hour notice requirement was shown. Section 618 of the Insurance Law does not call for a determination of compliance as a matter of fact by the court, but rather that the court be "satisfied" that the applicant has complied with Section 608.[65] In short, a prima facie showing of compliance with this notice requirement was made, even though the court felt it was "not free from skepticism."

V. Arbitration

a) In general

One of the most interesting features of the Endorsement is the requirement that, should the Corporation and the insured be unable to agree on legal liability and/or the amount of damages owing, the determination shall be made by arbitration.[66]

Though not an insurance carrier having direct relations with an insured, MVAIC realized that court action would not be appropriate for the newly issued protection against uninsured motorists. The intent and spirit of the Act was to provide a remedy, where none had existed before, through informal but regulated transactions with MVAIC. The purpose of the Corporation would be defeated if a

64. See note 14 supra.

65. *Garcia v. MVAIC,* N.Y.L.J., Oct. 28, 1959, p. 12 col. 4. See also *Bleier v. MVAIC,* N.Y.L.J., Sept.. 30, 1960, p. 14 col. 3. Here the court denied a motion to stay arbitration where there was nothing to contradict the sworn statement that at the time of the accident a New York City police car was at the scene of the accident and the incident was reported to the attending patrolman.

66. ENDORSEMENT, Conditions § 6.

claimant were put to great expense in asserting and adjudicating his claim. At the same time, MVAIC has an obligation to the people of the State of New York to resist unjustified demands for settlement. Arbitration of all uninsured motorist disputes regarding legal liability and damages was found so successful by automobile insurance carriers that it was logical for the Corporation to adopt this procedure.[67]

The AAA has established a special panel of arbitrators with a membership consisting entirely of attorneys-at-law, nominated by Local Bar Associations or attorneys who have served as commercial arbitrators for the AAA. The very nature of the action, and the requirement that there be a "legal" determination of liability, seemed definitely to preclude the use of laymen. For its Accident Claims Tribunal, the AAA prepared special rules of procedure.

If an insured person sought leave to sue the Corporation, regarding legal liability or damages, his application would be denied.[68] Under the Endorsement, the named insured must have these controversies resolved by arbitration.[69] However, arbitration, which may take only from 30 to 60 days to its finality, would be of much greater practicality, since the same action in court would not be resolved for at least two years under present day negligence calendar congestion.

b) Initiating arbitration

The arbitration is initiated by the claimant serving a demand upon the Corporation notifying the latter of his intention to arbitrate the dispute. Due to the widespread use of arbitration in uninsured motorist cases, the AAA has printed forms for initiation, available upon request.[70] This Demand for Arbitration, as it is called, should

67. MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION, YOUR PROTECTION AGAINST UNINSURED MOTORISTS IN NEW YORK, states that "In the case of a disputed claim by a qualified person, arbitration is optional." However, there being no written contract providing for arbitration between the qualified person and the MVAIC which the qualified person could use as a basis for serving a "Demand" for arbitration, another method of initiation must be used. Such procedure involves the signing of a "Submission" agreement which enables the American Arbitration Association, as administrator, to accept jurisdiction of the proceedings. The only complete exclusion from the arbitral forum is the qualified person who is injured by a hit-and-run motorist. See note 80 supra.

68. *Lauer v. MVAIC,* N.Y.L.J., July 1, 1960, p. 5 col. 6.

69. Ibid. See also *Allstate Ins. Co. v. Modica,* N.Y.L.J., March 25, 1960, p. 12 col. 2; *Caso v. Phoenix Ins. Co.,* N.Y.L.J., March 30, 1959, p. 10 col. 4.

70. To receive these forms as well as the ACCIDENT CLAIMS TRIBUNAL RULES, write to the American Arbitration Association, 477 Madison

quote the applicable arbitration provision of the Endorsement, indicate the amount sought by the claimant, and in addition a copy of the insurance policy should be included. Four copies of the Demand should be filled out, two being mailed to the AAA, one to the other party, and the fourth retained by the claimant for his own records.[71]

The Demand, or notice of intention to arbitrate, need not be personally served upon the Corporation. New York law permits the mailing of these papers in accordance with the Rules of the AAA as sufficient notice of the impending arbitration.[72]

c) Matters for court determination

When the insured claimant and the MVAIC are unable to agree on issues other than the liability of the uninsured person who caused the accident or damages then the matter is for court determination. Thus it has been held by many court decisions construing arbitration provisions similar to the one found in the Endorsement, that the question of whether or not a particular vehicle is uninsured, is not left to arbitration.[73]

However, the amount of proof needed to show that a driver is in fact uninsured need not be overwhelming. An uncontradicted motor vehicle report by an automobile owner stating that his vehicle was driven by an operator without his permission has been held sufficient.[74]

1. Motion to Compel Arbitration

If the Corporation should refuse to proceed with the arbitration, the claimant has the option of proceeding ex parte or making a motion in the Supreme Court[75] to compel the Corporation to appear. On this motion to compel arbitration, the Corporation may set forth

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Avenue, New York 22, N. Y. The appropriate fee, which must accompany any demand for arbitration, is found in the above-mentioned Rules, § VIII, Fees and Expenses.

71. AMERICAN ARBITRATION ASSOCIATION, ACCIDENT CLAIMS TRIBUNAL RULES III § 7 (1955).
72. Id., VI § 20.
73. See e.g., *American National Fire Ins. Co. v. McCormack*, 15 Misc.2d 692, 182 N.Y.S.2d 899 (Sup. Ct. 1958); *Glens Falls Ins. Co. v. Finkel*, N.Y.L.J., March 25, 1959, p. 10 col. 1; *Allstate Ins. Co. v. Weiss*, N.Y.L.J., Feb. 23, 1960, p. 13 col. 2; *Mitkewicz v. Travelers Ins. Co.*, 22 Misc. 2d 637, 198 N.Y.S. 2d 101 (Sup. Ct. 1960).
74. *Lowe v. Ocean Accident Guarantee Corp., Ltd.*, 21 Misc.2d 1042, 193 N.Y.S.2d 361 (Sup. Ct. 1959). See also *Aetna Ins. Co. v. Bruce*, N.Y.L.J., Dec. 1, 1959, p. 12 col. 6.
75. For discussion of jurisdiction of the Supreme Court, see *Schein v. Allstate Ins. Co.*, N.Y.L.J., May 15, 1959, p. 13 col. 1.

any reasons it has for claiming that arbitration is not timely. Such defenses might be failure to comply with a condition precedent such as non-submission to a medical examination or late filing of the notice of intention to file the claim.[76]

2. Questions of fact

All questions of fact may be presented in opposition to a motion to compel arbitration (or in opposition to a motion to stay legal proceedings, or in a motion to stay arbitration or under certain conditions in opposition to a motion to confirm an award). Upon these motions the court will in the first instance determine whether there is a substantial issue of fact, and will direct a trial thereof only if satisfied that there is such an issue.[77] If such a trial is directed, either party, within certain time limits, may demand a jury as in the case of a framed issue in an equity action. Whether the issue is to be tried by a court or by a jury, the original motion (to stay or compel arbitration) will be held in abeyance pending trial.[78]

The preliminary court hearing is similar to the hearing of a motion for summary judgment; therefore the papers of both parties should set forth evidentiary facts. The court's function is confined to determining (1) whether the claimant is one of the two types of persons eligible to bring a claim against MVAIC, and (2) whether the necessary conditions precedent contained in the Endorsement have been complied with. There is no determination of legal liability or damages made here.

Another defense by MVAIC might be that the claimant has a pending action against the uninsured. Since the Corporation may not negotiate settlement of the claim while an action is pending against an uninsured,[79] and the latter has not agreed to be represented by the Corporation in that action, but chooses to have his own counsel, it would be detrimental to allow arbitration to proceed until the lawsuit is resolved.

3. Questions of Law

Apart from any triable issues of fact, it may be necessary for the court to pass on certain questions of law. As already noted, the court may be called upon to determine if the claimant is either a qualified

76. *MVAIC v. De Freitas,* N.Y.L.J., May 6, 1960, p. 13 col. 2.
77. *Federal Ins. Co. v. Lieb,* N.Y.L.J., April 8, 1960, p. 10 col. 6.
78. *Allstate Ins. Co. v. Gaillard,* N.Y.L.J., March 22, 1957, p. 5 col. 8; *Stroud v. MVAIC,* N.Y.L.J., Sept. 30, 1960, p. 14 col. 1.
79. *MVAIC v. Koenig,* N.Y.L.J., March 21, 1960, p. 15 col. 3.

person seeking leave to sue MVAIC, or if he is in the category of an insured person who may commence an arbitration against the Corporation. All preliminary legal questions, such as compliance with the time limit within which claimant must file notice of his intention to file a claim, are also decided by the court.

4. Stay of Legal Proceedings

Should a claimant commence a lawsuit against MVAIC, attempting to by-pass the exclusive remedy of arbitration,[80] the Corporation may obtain a stay of proceedings in the court in which the law suit was brought. Such a stay may also be obtained in the Supreme Court, irrespective of whether the action was commenced there, and if the Corporation also desires to compel the arbitration in the same motion application must be made in the Supreme Court. Under New York law, a stay is the only remedy when a suit is brought in violation of the arbitration clause in the Endorsement. An answer pleading the arbitration agreement is by itself ineffectual and could conceivably result in a waiver of the Corporation's right to arbitrate.[81]

d) Waiver

An arbitration agreement, like any voluntary contract provision, may be waived by the parties. However, there cannot be a unilateral decision to waive arbitration by the insured claimant alone. Should a claimant institute an action against MVAIC and the latter decide to answer and not stay the court proceedings pending arbitration, the agreement to arbitrate would be effectively waived.

Waiver also plays an important role in the arbitral proceedings. Participation in the arbitration hearings and failure to object to any defects constitutes a waiver of the right to object to the legality or untimely demand for arbitration.[82]

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80. Arbitration is not granted to all potential claimants; e.g., a qualified person may *not* arbitrate a claim against an alleged hit-and-run driver. The statute provides for an application to *sue* the Corporation, which is to be made in the Supreme Court. The Legislature obviously feared the possibility of fraud and mistake so easily resulting from hit-and-run situations.

However, an applicant need merely make a prima facie showing of compliance with the requirements of § 618 for the court to grant him an order permitting him to bring action against the Corporation. *Howitt v. MVAIC,* 21 Misc.2d 694, 197 N.Y.S.2d 273 (Sup. Ct. 1959); *Shaw v. MVAIC,* 199 N.Y.S.2d 689 (Sup. Ct. 1960).

81. *Eisenberg v. Melucci,* N.Y.L.J., April 6, 1959, p. 6 col. 3.

82. See e.g., *Security Ins. Co. v. Stevenson,* N.Y.L.J., April 12, 1957, p. 6 col. 7; *Royal Indemnity Co. v. McMahon,* 10 App. Div.2d 926, 200 N.Y.S.2d 549 (1st Dept. 1960).

A typical example is failure on the part of the claimant to comply with all of the conditions precedent to arbitration. Let us assume that claimant has not submitted to an examination as required by the Endorsement, but that the Corporation has not asked him to do so. The claimant makes a demand for arbitration and the Corporation fails to make a motion to stay arbitration because of an untimely demand, though one of the conditions precedent to arbitration has not been met. Complaining to the arbitrator of this default will be of little avail since the defect will have been waived.

The proper remedy for the Corporation would be to move to stay arbitration in the Supreme Court. Such motion should be brought on prior to the arbitration hearings, for if it is heard after the award has been rendered, it will be dismissed as moot.[83]

e) Arbitrating the Infant's Claim

The arbitration agreement in the Endorsement is not binding on an infant. The Court of Appeals, in *Chernick v. Hartford Acc. & Ind. Co.*,[84] held that sec. 1448 of the N.Y.C.P.A., which excludes infants from being compelled to arbitrate without permission of the court on application from a guardian ad litem, applies to arbitration provisions of uninsured automobile coverage endorsements.

Prior to the enactment of the MVAIC Law some courts allowed the infant the option of instituting arbitration or an action at law.[85] Further, the infant could not be compelled to arbitrate under an uninsured automobile endorsement nor could he be prevented from bringing an action at law despite the arbitration agreement.[86]

It is probable that under the MVAIC the infant will also be allowed the option of arbitrating or instituting court action.[87] To limit the infant strictly to court action would deny him the advantage of securing an immediate adjudication through arbitration.

The proper procedure in bringing an infant's claim to arbitration would be initially to appoint a guardian ad litem who should petition the court for an order permitting the infant to arbitrate. Failure to so petition the court may be grounds for the Corporation to seek to stay the arbitration. However, failure to designate a guardian ad litem for an infant in an accident claims arbitration is not a

83. *Watts v. Allstate Ins. Co.*, N.Y.L.J., Nov. 13, 1959, p. 12 col. 8.
84. 8 N.Y. 2d 756, 201 N.Y.S.2d 774 (1960).
85. *Farin v. Sercarz*, 179 Misc. 490, 39 N.Y.S.2d 482 (Sup. Ct. 1942).
86. *Benfante v. Commercial Ins. Co. of Newark*, 5 Misc.2d 772, 162 N.Y.S.2d 715 (Sup. Ct. 1957).
87. See note 85 supra.

fatal error. Such designation can be made nunc pro tunc in an order denying a motion to stay arbitration.[88]

f) Appointment of Arbitrator

The rules of the American Arbitration Association provide:

"Section 10. Designation of Arbitrators—The case will be heard by one Arbitrator but where either party requests that three Arbitrators be appointed, the Administrator will appoint three. The Arbitrators will be appointed from the Special Accident Claims Panel. Members of the Panel serve without fee in accident claims arbitrations. In prolonged or in special cases, the parties may agree to the payment of a fee.

Any arrangements for the compensation of a Panel Arbitrator shall be made through the Administrator.

Section 11. Qualifications of Arbitrators—No person shall serve as an Arbitrator in any arbitration if he has any financial or personal interest in the result of the arbitration, unless the parties, in writing, waive such disqualification.

Section 12. Disqualification of Arbitrators—An Arbitrator is required to disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator. The Administrator shall forthwith appoint a substitute Arbitrator.

Either party may advise the Administrator of any reason why he believes an Arbitrator should withdraw or be disqualified from serving. The Administrator, after consideration thereof, may declare the office vacant and appoint a substitute Arbitrator."[89]

g) The Hearing

The time and place of the hearing are selected by the arbitrator, and the parties are entitled to receive at least five days notice.[90] If either party desires a particular locality for the arbitration to be held, they should notify the administrator within seven days from the date of the filing of the demand for arbitration. Failure to request a particular locale within the time specified bars a later re-

88. *Exchange Mutual Ins. Co. v. Scandura*, 17 Misc.2d 496, 187 N.Y.S.2d 103, aff'd 8 App. Div.2d 264, 188 N.Y.S.2d 939 (1st Dept. 1959).
89. AMERICAN ARBITRATION ASSOCIATION, ACCIDENT CLAIMS TRIBUNAL RULES IV §§ 10, 11 and 12 (1955).
90. Id., V § 13.

quest. Where one party objects to the locale selected by the other or where the parties cannot agree, selection will be made by the administrator. If one party selects a locale which is not objected to, then that locale will be prescribed.[91]

Once the arbitrator has been chosen, any and all adjournments must be requested of him through the administrator.[92] Where reasonable ground is given for adjournment, the arbitrator normally grants the privilege, as failure to grant an adjournment for good cause shown may be grounds for vacating the award.[93] It is usual that the arbitration is concluded in a single hearing at the time originally set. Further, the court has power to direct the arbitrators or a claimant or respondent to proceed promptly with the hearing and the determination of the claim.

Arbitrators have power to subpoena or summon witnesses.[94] The party requiring the production of persons or records need merely request the arbitrator to issue a subpoena upon a showing of the materiality of the requested evidence or testimony involved.

The hearing itself is conducted in very much the same manner as a hearing before a referee, although strict rules of evidence do not apply and a stenographic record is not kept unless specifically requested by one of the parties. The arbitrator, though bound to give a legal determination of liability, is not required to adhere to the rigid rules of procedure in receiving evidence which apply in court. As a result, the arbitrator is usually quite liberal in receiving evidence, especially since refusal to hear material evidence is a ground for vacating the award.[95] Counsel should bear in mind that the amount of evidence received is not at all determinative of the weight or credit which it will have on the ultimate determination in the case. As arbitrators in accident claims cases are experienced members of the Bar, there need be no fear that pertinent evidence will be disregarded. Objections to the admission of evidence should be minimized as freedom from interruption of testimony makes it possible to get a clearer and more connected account from witnesses.

Presentation of opening and closing remarks are helpful and usual, however, they, as with submission of briefs and memoranda, are within the discretion of the arbitrator. As a practical matter they

91. Id., III § 9.
92. Id., V § 14.
93. N.Y. CIV. PRAC. ACT § 1462 (3).
94. Id., § 1456.
95. See note 93 supra.

will be accepted because failure to do so may be grounds for vacatur of the award.[96]

The arbitrator is not allowed to conduct any independent investigation or to receive evidence except in the presence of the parties. However, the parties may mutually agree to give the arbitrator permission to conduct an ex parte investigation.

When the hearings are closed the arbitrator will usually reserve decision. The award must be rendered in writing within thirty days from the closing of hearings.[97] If briefs are to be submitted, then the date the award is due must be within 30 days of the filing of briefs.[98]

Any time prior to the award being rendered the parties may settle the case between themselves. "If the parties settle their dispute during the course of the arbitration, the Arbitrator, upon request, may set forth the terms of the agreed settlement in an award."[99]

h) Right to counsel

By providing for arbitration as the means of settling their disputes the MVAIC has sanctioned a procedure whereby an injured person may collect his claim without the need for an attorney. As a practical matter, however, claimants have never come to the American Arbitration Association's accident claims tribunals unrepresented.

Further, the Civil Practice Act specifically protects a person's right to have an attorney at an arbitration proceeding by stating that no waiver of the right to be represented by an attorney ". . . shall be effective, unless evidenced by a writing expressly so providing. . . ."[100]

i) The Award

Under AAA procedure the arbitral award is in writing, in accordance with the New York Civil Practice Act, signed and acknowledged by the arbitrator and then mailed simultaneously to both parties. There is no requirement upon the arbitrator to render written opinions or explain the grounds for his award.[101] Legal delivery is

96. Ibid.
97. AMERICAN ARBITRATION ASSOCIATION, ACCIDENT CLAIMS TRIBUNAL RULES VII § 21 (1955).
98. Id. § 17, *De Turris v. Great American Ins. Co.*, N.Y.L.J., May 9, 1960, p. 15 col. 3.
99. AMERICAN ARBITRATION ASSOCIATION, ACCIDENT CLAIMS TRIBUNAL VII § 23 (1955).
100. N.Y. CIV. PRAC. ACT § 1454 (1).
101. *Exchange Mutual Ins. Co. v. Scandura*, N.Y.L.J., Feb. 24, 1960, p. 13 col. 3.

made when the award is placed in the mail by the tribunal clerk of the Association.[102]

1. Confirming the award

Normally when the claimant wins an award in arbitration the MVAIC voluntarily performs the terms of the award and no further action need be taken since the monetary award which was sought has been obtained. However, where a claim is dismissed by the arbitrator or where the successful claimant wants to have judicial sanction for the enforcement of the award, judgment should be entered on the award.[103] This is done by making a motion to confirm the award in the Supreme Court within one year after the award is delivered to the parties. This motion is brought on by notice served upon the adverse party or his attorney as is prescribed by law for any other notice of motion in the Supreme Court.[104] The court will confirm the award in a summary fashion unless it has been vacated.

2. Vacating or modifying the award

A party may challenge an award by opposing a motion to confirm or by a motion to vacate, modify or correct the award served upon the adverse party or his attorney within three months after the award has been delivered.[105] The award can be vacated and set aside (1) on proof that it was procured by corruption, fraud or other undue means, or (2) upon proof of evident partiality or corruption in the arbitrators or any of them, or (3) where the arbitrators refused to hear pertinent and material evidence, or to postpone the hearing upon sufficient cause shown, or where they have been guilty of any other misbehavior by which the rights of any party have been prejudiced, or (4) where they exceeded their powers or so imperfectly executed them that a mutual, final and definite[106] award upon the subject matter submitted was not made.[107] Under New York law a court's power to vacate an arbitration award is restricted to those instances set forth in the Civil Practice Act. Where the grounds advanced by the losing party are not among those included in the statute a motion to vacate the award will be denied.[108]

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102. AMERICAN ARBITRATION ASSOCIATION, ACCIDENT CLAIMS TRIBUNAL RULES VII § 24 (1955).
103. N.Y. CIV. PRAC. ACT §§ 1464, 1465, 1466.
104. Id., § 1461.
105. Id., § 1463.
106. See *Tenant v. Allstate Ins. Co.*, N.Y.L.J., May 8, 1959, p. 15 col. 5.
107. N.Y. CIV. PRAC. ACT § 1462.
108. *De Simone v. MVAIC*, N.Y.L.J., Oct. 23, 1959, p. 12 col. 8; *Watts v. Allstate Ins. Co.*, N.Y.L.J., Jan. 21, 1960, p. 11 col. 8.

3. Court Review

The Civil Practice Act specifies what papers are to be filed for the entry of judgment upon an order confirming, modifying or correcting an award.[109] It is also provided that the judgment "shall have the same force and effect in all respects and is subject to all the provisions of law relating to a judgment in an action."[110] Every award, whether ex parte or otherwise, which has been confirmed, is res judicata as to all matters concerned with legal liability and damages.

There is no appeal from any rulings of the arbitrator or his award. An appeal lies only from a court order or a judgment entered upon the award.[111] Further, judicial review is confined to defects in procedure rather than with the sufficiency of the evidence or the merits of the award. The arbitration award may not be impeached for any errors of law or fact.[112] If the arbitrator is not guilty of fraud, corruption or other misconduct affecting his award, then the award is unassailable and the parties must abide by its terms.

VI. Conclusion

The apparent never ending stream of automobiles entering upon the highways of New York has highlighted the problem of the financially irresponsible motorist. The Compulsory Insurance Law requiring proof of financial stability, by itself, proved an unsatisfactory solution to all potential claimants.

Enactment of Article 17-A of the Insurance Law was a major step in meeting the needs of all innocent victims of uninsured motorists. The newly formed MVAIC has established rules and procedures whereby persons may make claims and collect thereunder as expeditiously as possible.

The provision for arbitration of certain disputes is extremely advantageous to any injured claimants and is of substantially greater value to the injured party than it is to the MVAIC.[113] It establishes a means whereby he can collect for his injuries, when disputed by the Corporation, quickly and with negligible expense.

The Financial Responsibility Law and Article 17-A of the Insurance Law constitute a sound beginning to the solution of the problem of the uninsured motorist in New York.

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109. N.Y. CIV. PRAC. ACT § 1465.
110. Id., § 1466.
111. Id., § 1467.
112. *Wiener v. Queen Ins. Co. of America*, N.Y.L.J., Nov. 20, 1959, p. 13 col. 2.
113. Hume, A LOOK AT UNINSURED MOTORIST COVERAGE, THE INSURANCE EDUCATOR, July 23, 1960, p. 168.

IS COMPULSORY ARBITRATION NECESSARY?

by Asher W. Schwartz*

Compulsory arbitration was the subject of vigorous discussion in official circles in the critical period immediately following World War II. In some states, the feeling was mighty strong in favor of compulsory arbitration, at least so far as public utilities are concerned. Eight states adopted compulsory arbitration statutes for labor disputes involving public utilities in 1947. Kansas already had its famous Industrial Court statute on the books. The eight other states were Nebraska, Florida, Indiana, Michigan, Missouri, New Jersey, Pennsylvania and Wisconsin. Compulsory arbitration was proposed nationally during the That session of Congress had at least five bills to require compulsory arbitration in lieu of strikes in the public utility industries. Each was rejected, Senator Taft speaking quite firmly on the subject:[1]

> Basically, . . . the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. In the long run, I do not believe that that right will be abused. In the past, few disputes finally reached the point where there was a direct threat to the defiance of the rights of the people of the United States.
>
> We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices, and working conditions. But if we impose compulsory arbitration, or if we give the government power to fix wages at which men must work for

1. 93 Cong. Rec. 3835, 3836 (1947).

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another year or for two years to come, I do not see how in the end we can escape a collective economy. If we give the Government power to fix wages, I do not see how we can take from the Government the power to fix prices; and if the Government fixes wages and prices, we soon reach the point where all industry is under Government control, and finally there is a complete socialization of our economy.

His views were reflected in the report of the Senate Committee:[2]

> "The theory of this section is that it is not desirable in an economy such as ours for the Federal Government to play a partisan role with respect to disputes between management and labor and that compulsory arbitration is not an effective or desirable method to be employed."

These attitudes were important, not only because of the direction which the Taft-Hartley Act took in this connection, but also because of its subsequent impact on the state legislation which adopted compulsory arbitration.

It will be recalled that the Kansas law had already had constitutional difficulties before the U.S. Supreme Court in the *Wolff Packing Company* case.[3] After that decision, the law was of little practical value. The New Jersey statute was declared unconstitutional by the New Jersey courts because it had failed to establish appropriate standards to be followed by the arbitrators[4] (*Van Riper v. Traffic Telephone Workers Federation of New Jersey*) The law was then reenacted with standards.

But all the state statutes, those of Kansas, New Jersey and the others, were undermined by the U. S. Supreme Court decision in the Wisconsin Employment Relations Board case in 1951, because they were in conflict with the Taft-Hartley Act. The Court held that the Taft-Hartley Act pre-empted regulation of collective bargaining in industries affecting interstate commerce, including public utilities, and the state laws were invalid in so far as they purported to regulate these industries on the same subject[5] Mr. Taft therefore had not only suc-

2. Senate Report No. 105, 80th Congress, First Session, 28 (1947).
3. 262 U.S. 522 (1923).
4. *Van Riper v. Traffic Telephone Workers Federation of New Jersey,* 2 N.J. 335 (1949).
5. *Amal. Assoc. of Street, Electric Railway and Motor Coach Employees of America, Div.* 998 *et al. v. Wisconsin Employment Relations Board,* 340 U.S. 303 (1951).

cessfully banned compulsory arbitration on the federal level but he had also effectively barred it in the several states as well, at least in so far as industries affecting interstate commerce are concerned.

It is perhaps unfortunate that the states which adopted compulsory arbitration statutes did not have an opportunity to experiment with them in the public utility field, even though the Australian, New Zealand, Kansas and Phillipines experiences had already been unfavorable.

New Zealand and Australia had turned to compulsory arbitration at an earlier date, with little or no success in avoiding strikes or solving their industrial relations problems. The Phillipines' experience with a court of industrial relations, which is a form of compulsory arbitration, from 1937 to 1953, was so bad that a statute was enacted in June, 1953, scrapping the old law and enacting a new one, which declared among other things that: "Industrial peace cannot be achieved by compulsion of law. . . . Sound stable industrial relations must rest, in keeping with the spirit of . . . democratic institutions, or an essentially voluntary basis." (Section 7)

Despite a history hostile to compulsory arbitration, we are now giving it a second look. It may be assumed that, if compulsory arbitration is accepted as necessary, appropriate legislation would amend the Taft Hartley Act to make it constitutionally valid.

Arguments Pro and Con

We ask ourselves what are the arguments pro and con which are to be weighed in the balance.

Pro

In favor of compulsory arbitration, it is said that in a vital industry the public health and safety come first. If strikes threaten the public health and safety, they cannot be tolerated in any economy. Compulsory arbitration is a fair substitute for industrial warfare and, in the interest of the general public, must be accepted by the parties. State regulation of the operations and of the rates of public utilities may be extended to their labor relations for the protection of the public health and safety. Since strikes which affect the public health and safety may menace the very existence of the democratic society which tolerates and encourages collective bargaining, compulsory arbitration is a protection to collective bargaining in a democracy, and not a departure from it. Compulsory arbitration introduces orderly, judical procedures in place of unregulated jungle tactics in vital industries.

The public should not be made to endure inconveniences and hardships wrought by stalemates in collective bargaining when arbitration is available. Public utility employees should be treated like Government employees in this connection. Public utilities are guaranteed Government cooperation, which insures jobs for public utility employees. Public utility employees, like Government employees, must therefore give up some rights which other workers enjoy.

Con

Compulsory arbitration, on the other hand, is attacked as being inconsistent with a democratic form of government. It makes second class citizens out of employees who happen to be working in the industries to which it is applied.

It minimizes or eliminates free collective bargaining. It will not work because workers cannot be forced to remain on the job or be efficient in their work. It is the beginning of the end for the freedom to contract, and it will lead to further governmental intervention into the affairs of basic industries.

Wages and working conditions will be fixed by persons whose impartiality and good judgment cannot be taken for granted. Awards will be affected by prevailing political moods. Labor would be pushed fully into politics. It will lead to government control of prices and profits. It is a threat, not only to free collective bargaining but also to free enterprise in a free economy.

Compulsory Arbitration Generally Disapproved

Some political leaders have argued for it, but with a noticeable degree of caution. Most, like Senator Taft, and without regard to party labels, have rejected compulsory arbitration. Labor union officers and industrial relations specialists have resisted it. Business men, too, have been opposed to it with some exceptions. The best single comment on their position was stated in Dun's Review, January, 1960, in an article on the steel strike. "In essence, the business man who gets hurt by a strike through no fault of his own and who is least likely to come under compulsory arbitration seems to be its strongest proponent."

Secretary of Labor Mitchell has declared that the Government should not have such a club as compulsory arbitration, no matter how cautiously it is used. Spokesmen for the American Arbitration Association have opposed it as not compatible with our free enterprise system.

IS COMPULSORY ARBITRATION NECESSARY?

Necessary For What?

Conceivably, compulsory arbitration might be necessary (1) to obtain fair wages and reasonable working conditions for workers, whether organized, unorganized or poorly organized; or it might be necessary (2) to contain the increasingly high cost of the services or products which the industry furnishes for a price to the general public; or (3) might be necessary only because we want an end to interruptions of essential services.

Better Wages and Working Conditions

It would seem that anything that is necessary to the enjoyment of fair wages and reasonable working conditions by workers is good, even if it is compulsory arbitration. There are many disputes and many industries in which workers who are free to strike could nevertheless make greater gains and would rather do so through arbitration than through strike or free collective bargaining. Compulsory arbitration might improve their position.

Management used to have such fears and, quite generally, resisted arbitration. It still does. An important recent example is the General Electric dispute, in which arbitration has been proposed by the Union and rejected by the Company. Even the Pennsylvania Railroad rejected arbitration until it learned through fact-finding what the arbitrator would award.

But compulsory arbitration cannot reasonably be accepted only when and because it is likely to be favorable to the workers. We must assume the premise that we are functioning in a capitalistic as well as a democratic society. Management's interests cannot be ignored.

Nevertheless, a good case can be made for the necessity for compulsory arbitration whenever workers are barred, despite all other considerations, from bargaining freely for better wages and working conditions.

Government Employees With No Right to Strike

We find this to be the case in the area of public employment. The Condon-Wadlin law in New York State, and certain federal statutes, 5 U.S.C. 118p and Section 305 Taft-Hartley Act, as well as innumerable judicial decisions, have banned strikes by Government employees.

It is grossly unfair and unreasonable to lay down the law to these workers that they do not have the right to strike, even though they purportedly have the right to bargain collectively, when the ultimate decisions on their wages and terms of employment are in the complete, uni-

lateral control of management. They are entitled to something in return for this second class status which is imposed on them, assuming we do not give them the right to strike.

A possible answer is compulsory arbitration. Management's unilateral authority would be subject to some kind of participation by the workers' representatives in framing their working conditions and other terms of employment.

The most significant arguments against compulsory arbitration are inapplicable in the area of public employment. In the first place, the parties already do not have free collective bargaining since the right to strike is barred by law. The possibility of a change in this connection is not very good, even in New York despite the current attack on the Condon-Wadlin law. Furthermore, in government employment, there is already government participation in and control of the industry in which the employees work.

Basically, good health, fair dealing, and sound reason make it necessary that the unions have some method of compulsion or persuasion, or effective participation, that will fulfill the constitutional right of public employees as well as all other employees to bargain collectively and effectively with management.

Effect of Public Utility Labor Costs on Prices

A special case may be made out for public utilities because prices and earnings are already under government regulation. Public utilities, it is said, lack the incentive to cut costs which spurs industry generally on to negotiate hard labor agreements. This is so because, it is contended, public utility managements can readily recover increased labor costs by taking advantage of their monopolistic positions. They operate on a cost plus basis. Public Service Commissions will sanction increases in rates, based on whatever increases in costs the public utilities incur. The public utility risks nothing by raising wages and improving working conditions. The public has to pay for it.

This contention is not supported by the facts. There is no doubt Utility Commissions, like that of New York, examine labor contracts of companies under their jurisdiction to determine whether the public utility has abandoned its responsibility to bargain a fair and reasonable contract from the point of view of management.

Furthermore, every increase in price reduces consumption, no matter how vital the facility. There is a falling off of unit demands. Consumer resistance makes itself felt by the ability of consumers to substitute other services or facilities and by the ability of their repre-

sentatives to force delays in the approval of management's applications for higher rates. Moreover, once rates are fixed, the public utilities gain the difference between costs and gross income, giving them an incentive for reducing labor costs.

Many public utilities, and the unions representing public utility employees, have submitted their cases to voluntary arbitration and public utility managements have universally quite conscientiously and effectively resisted union demands which mean high increases in labor costs. The position of the unions in disputes with public utilities has certain inherent limitations because of the potential effects of their demands, and of strikes intended to win them, on consumer pocketbooks and on the public convenience.

If protection to the consumer as a paying customer is the objective of compulsory arbitration, the arbitrators will presumably be governed by their mission to protect the public rather than by any desire to produce an equitable and fair labor agreement for the parties. Those who will be responsible for the appointment of the arbitrators will be held personally accountable for the effects of the awards on the public's pocketbooks. Politics, not economic wisdom, will govern the industry's labor-management relationships. Wage and other money increases will be allowed or disallowed mainly on the basis of demand conditions in each particular utility. The impact on collective bargaining agreements will vary, depending upon the kind of service the particular utility renders and the special conditions which prevail in a particular area.

Thus, compulsory arbitration is not a satisfactory or appropriate device for containing public utility rates or other industrial price structures, and is hardly a necessary one.

Compulsory Arbitration Ends Collective Bargaining

Compulsory arbitration means the end of real and free collective bargaining, wherever it is applied. Parties who know that their agreements will ultimately be decided for them if they fail to reach an agreement themselves will in fact make no bona fide attempt to agree. This has been my personal experience in all situations in which contracts have arbitration clauses written into them, and even in situations which are subject only to the appointment of fact-finding boards, such as those under the Railway Labor Act.

An agreement in a labor dispute is seldom reached without concessions, and concessions are not made by any party if he knows that there is always a possibility that an arbitrator may not exact a concession which he might be willing to yield to avoid a strike. From the

point of view of a good bargaining position before the arbitrator, each party has to make as few concessions as possible in negotiations.

Arbitrators are inquisitive fellows, or lazy, or sometimes helpless unless they know where the parties were when they broke off negotiations. Once a party has given something up in negotiations, he can rarely recover it. The arbitrator is expected to be fair and impartial, not only in what he awards to the parties but also in what he denies. The arbitrator must be in a position to prove his impartiality by turning down as much of one party's request as will balance his rejection of the demands of the other party. The parties do not accomplish this result unless, prior to the inevitable arbitration proceeding, they have done as little as possible during negotiations in narrowing down their respective proposals.

Our experience under the Railway Labor Act has already borne this out. The almost certain appointment some years ago of a Presidential Fact-Finding Board in any dispute of substantial proportions under the Railway Labor Act was officially recognized by the National Mediation Board as a deterrent to genuine bargaining. For a while, therefore, a policy considerations thwarted the making of such appointments. All carrier and union representatives were told informally, but firmly, that a Presidential Board would not be appointed and that they had therefore better get down to hard bargaining if they wanted to avoid a strike.

But the temptation to keep the labor peace at any cost was too great; for some time now, we have found that it is almost inevitable that a Presidential Fact-Finding Board will be appointed in any major dispute under the Railway Labor Act. The effect has been that bargaining is largely a sparring match to put the parties in good shape for the compromising efforts of a Board certain to be appointed.

Railroad and Airlines: "Minor" and "Major" Disputes

As the railroads and airlines are important public utilities, national in scope, some special mention should be made of the significance of compulsory bargaining under the Railway Labor Act. Under that Act, we in fact now have a form of compulsory arbitration in disputes called minor disputes. In the *Chicago River* case,[6] the Supreme Court sustained an injunction against a strike involving a "minor" dispute, meaning a dispute concerning the application or interpretation of an agreement as distinguished from a "major" dispute, meaning one

6. 353 U.S. 30 (1957).

in connection with the formation of the terms of the agreement. In the *Manion* case,[7] the injunction in these circumstances would be sustained only when the issue is submitted to an appropriate Adjustment Board and arbitration is actually available to the union. In these strike cases, injunctions will therefore always lie, because in a practical sense every carrier can generally make out a prima facie case of irreparable injury and all the carrier has to do is submit its dispute to an adjustment board—which it does. In substance, therefore, the union is compelled to arbitrate the dispute, not because of any law to that effect but because of the return of the labor injunction through judicial decision, the Norris-LaGuardia Act notwithstanding.

Now it is proposed directly by law that this process be extended to major disputes under the Railway Labor Act, which means in effect the obliteration of the distinction between major and minor disputes. It is quite possible, and perhaps probable, that unions will be tempted to serve Section 6 notices, which normally initiate major disputes under the Railway Labor Act, as often as they now serve grievance claims.

What Standards and Who Will Fix Them

It is unrealistic to believe that legislation can be adopted establishing compulsory arbitration, without at the same time fixing standards for arbitration clauses which we find in labor agreements, and the kind of arbitration we are talking about here, is that the labor agreement itself fixes the authority of the arbitrator. He interprets and applies an agreement determined in advance by the parties themselves.

In fixing wages and working conditions, however, there is no guide for the arbitrator unless one is fixed for him and it would have to be done in the law itself. The New Jersey Court of Errors and Appeals declared New Jersey's compulsory arbitration statute, applicable to public utilities, to be invalid and unconstitutional for its failure to have standards.

Assuming adequate and fair standards could be developed, who would enforce them? We must assume that appeals from arbitrators' awards would be taken to the courts, as was done in New Jersey. Wages and working conditions would become subject to judicial review and to the application of judicial precedents and rulings. We may find the emergence of a labor movement under the leadership of lawyers.

7. 353 U.S. 927 (1927).

Strikes Under Compulsory Arbitration

We must realize that with compulsory arbitration strikes become strikes against the Government and not against individual employers. Government must bear the responsibility of economic breakdowns resulting from compulsory arbitration. It does not follow that strikes will be avoided merely because the Government adopts a system of compulsory arbitration. We have seen strikes against Government agencies covered by the Condon-Wadlin Law. In New Zealand and Australia, strikes were not covered by a compulsory arbitration law.

One of the problems in this connection is that the normal sanctions for violations of law may not be effective. These normal sanctions would be dismissal from employment or criminal prosecution, or both. If public utility employees strike, they certainly are not going to return to work while they are threatened with heavy penalties on the job including dismissal, nor will they return to work if they are going to be prosecuted and sent to jail. At the same time, the agency against which they struck cannot replace them as promptly as is necessary. A public utility cannot readily go out into the open labor market and expeditiously return to normal operations, or perhaps any operations. If the service is essential to the general public, there is only one way of restoring that service and that is to get the employees back to work.

If a union membership is successful in stopping an operation which cannot be restored without the services of the strikers and the operation is essential to the public welfare or safety, we can rest assured that those employees will be allowed to return to work basically without penalty. What does that mean to other public utility or other employees similarly subject to the same law whose unions may not be quite so strong and who are therefore sent to jail, dismissed from employment, or otherwise penalized? Would this discrimination occur as between industries and as between companies? All of this creates a rather messy situation, including a growing disrespect for law and government.

What Industries Should Arbitrate Under Compulsion?

Another issue we would have to face is the selection of the particular industries to be made subject to compulsory arbitration. Why transportation? Is operation of the bus lines on Madison Avenue or of the Atlantic City Express of the Pennsylvania-Reading Railroad more essential than the uninterrupted delivery of oil or of milk, or of beer in New York City? When some seven or eight years ago the breweries in New York City were on strike, we had considerably more public pressure for settlement by the time July came along than we had during

the strike of the Pennsylvania Railroad! Many people considered a glass of beer in the Summer months more important than a ride on the Pennsylvania Railroad, and still do! The public pressures engendered by the New York newspaper strike in 1958, for example, were enormous, for obvious reasons. Would all of these industries be subject to compulsory arbitration? If not, who would decide and how would it be decided?

If we restrict ourselves to public utilities alone, something depends upon the kind of public utility we are talking about. Transportation is not in the same posture as is electricity. Local transportation differs from long distance transportation and air from rail. Telephone differs from them all.

The recent Pennsylvania Railroad strike caused much inconvenience to would-be travelers, but many of them found alternative methods of transportation, others stayed home or were delayed in their plans without disastrous effect. If any really serious damage was done, it was done in connection with the carrying of freight. There it caused financial harm to some businesses, some loss of employment, and other financial troubles. So did the steel strike. So does a decision by the War Department to let or cancel a contract for the production of large quantities of weapons.

There is a distinction between calamity, public inconvenience and private financial loss without threatening a calamity or the public health or safety. A public utility strike is therefore not reasonably subject to special treatment merely because it is a public utility. In addition, if we look at the record we find that the electric utility industry has been practically free from strikes as compared with the transportation industry without compulsory arbitration.

In the railroad industry, the reports of the National Mediation Board for the past 13 years, through July, 1959, show that there has been an average of 13 strikes a year on railroads and airlines taken together which filed an average of over 5,000 labor agreements with that Board each year. In the year ending June 30, 1959, there were 12 strikes of labor organizations under the Railway Labor Act which among them filed 5,215 labor agreements.

Conclusion on Compulsory Arbitration

It is difficult to see how, after all these years of economic liberty in this area, we can afford to let public inconvenience and incidental personal or business financial losses suffered as a result of strikes drive us to the dangerous panacea of compulsory arbitration. It threatens

our traditional political ideals and the realization of a truly healthy economy much more than can possibly be threatened to the public health or safety by free and genuine collective bargaining.

Compulsory arbitration is necessary when the workers are not free to bargain collectively in its fullest sense, viz. in the area of public employment.

It may be fortunate that the states which adopted compulsory arbitration statutes in 1947 did not have an opportunity to experiment with them in the public utility field, even though the Australian, New Zealand, Kansas and Phillipines experiences were bad.

It is significant that the law which outlawed those experiments might have been amended at any time since the Wisconsin Employment Relations Board decision, and quite appropriately, if there were any real public opinion in favor of compulsory arbitration in connection with the recent adoption of the Landrum-Griffin bill. That bill amends the Taft-Hartley Act in several respects, it addressed itself to at least one question of preemption, was enacted after the momentous steel strike, and could have readily removed preemption in the area of public utility strikes, letting the states adopt their own laws favoring compulsory arbitration.

CORRESPONDENCE

Arbitration in the Construction Industry

To the Editor:

In 1915, when the American Institute of Architects issued the Second Edition of its Standard Contract Documents, it adopted the principle of arbitration for practically all disputes that might arise. In the Owner-Architect Agreements all disputes were subject to arbitration if agreement was not reached. In the Owner-Contractor agreement, as determined by the General Conditions, all matters were to be decided in the first instance, by the architect. On questions involving "artistic effect" the architect's decision was to be final and binding, but on all other matters his decision was to be subject to arbitration at the request of either the owner or the contractor.

This action broke with long established practice. Its aim was to free the architect from the influence of final decisions that tended or could tend to arbitrariness. In effect the architect said he would give his best judgment as to what he considered a fair decision, but either party could ask for arbitration.

It was believed that this policy would reduce the number of disputes that required court action, and it is believed that this has actually happened. A research project is being studied by which it may be possible to form a definite judgment as to this result. Court cases are not compiled except those that are appealed. The latter can be checked in the various regional reports and by a study of these it is possible to find which of them involved contracts based upon the AIA Standard Contract forms. It may be possible to secure directly from architects a record of such cases as were finally settled in the lower court. Similarly it would be of interest to learn to what extent disputes are referred to arbitration. It will presumably be necessary to get such information also directly from architects who have been involved.

In recent years there has tended to be an increase in the frequency of court cases that involve claims against architects, involving direct claims by the owner as well as claims by third parties injured in connection with construction projects. There is evidence that

indicates that this increase has developed due partly to the increasing use by architects of Errors and Omissions Insurance.

The owner may have a claim against his architect for errors in the documents as a result of which the owner was put to extra expense. Such claims normally, under AIA agreements, would be settled by arbitration. Failure by the architect to discover some neglect by the contractor which resulted in an injury to a member of the public or to a workman on the job may permit a direct claim against the architect as well as a claim against the contractor. Such cases would not be referred to arbitration but directly to court action.

Further information is sought to determine to what extent architects are involved in such cases. It would be desirable to find out to what extent the decisions of arbitrators are carried to the courts for review due to claims that arbitrators acted beyond their powers or with some element of misbehavior, prejudice or fraud. This, however, may not easily be discovered.

The 1958 revised draft of the AIA Standard Form of Arbitration Procedure added in the opening article that the parties claiming arbitration could require it to proceed according to the AIA Procedure or could require that the arbitration be administered by the American Arbitration Association. No evidence is available as yet as to a preference for one or the other of these two procedures.

An essential factor, in either case, is that the arbitration is carried out precisely according to the details of whichever procedure is used. The various actions required must be carried out in accord with the time limits stated. Wherever there is an arbitration statute in force the judgment upon the award rendered by the arbitrators should be entered in the court having jurisdiction which gives the decision the effect of a court decision. At least eighteen states appear to have acted in accordance with this idea by passing statutes making agreements to arbitrate future disputes legal and enforceable.

Where there is no arbitration statute it has generally been held that either party could refuse to arbitrate and file his claim in court. This is based upon a concept, stated several hundred years ago, that arbitration was improperly removing the case from the courts which had proper jurisdiction. In a recent case the court has held that this decision was made under different conditions, that arbitration had now proved its value as a desirable method of procedure for deciding technical disputes, and was relieving the pressure on the Courts by settling such disputes.

Arbitration was adopted by the AIA some ten years before the desirability of arbitration in commercial and labor disputes brought about the organization of the American Arbitration Association. Since then the AIA has been grateful for the constant assistance of the AAA in the discussion of desirable procedure and in the development of the AIA Standard Form of Arbitration Procedure which adapts for the use of the construction industry elements of the procedure which the Association has found necessary for the handling of commercial and labor disputes.

Washington, D.C.

WILLIAM STANLEY PARKER
Consultant on Contract Procedures,
American Institute of Architects

Need for Exhibits in Labor Arbitration

To the Editor:

Parties in arbitration are probably making far less use of exhibits than they should. It is the purpose of these few words to explain why this is so, the advantages of adopting the suggestions here made, and what can be done to effect them.

The preparation and presentation of exhibits is, of course, part of the preparation and presentation of the case as a whole. It is part of the task of trying to convince the arbitrator. Any technique that contributes to that result may be deemed worthwhile.

What types of evidence should be presented in exhibit form that are not usually presented in that form? Some illustrations will indicate what I have in mind. There may be, for example, what might be termed "background" material. Suppose that the nature of the issue is such that it may be necessary or advisable to have the arbitrator understand generally the business of the plant or its operations, or the work of a particular department, or of an operation within a department, or of a particular machine or set of machines. Seldom is there much if any dispute about these objective or tangible aspects, and it is far better, for reasons to be given, that such material be put in exhibit form rather than be testified to only orally.

Exhibits need not be limited to such tangibles. The matter of

past practice, which often comes up in arbitration cases, is an illustration. Some evidence of practice often exists in records, company or union, and there is no sensible reason why such records, with accompanying separate tabulations if desirable, should not be produced. Sometimes there is no dispute about the practice, but one side takes the position that such evidence, for one reason or another, cannot validly change what the result would be (or is claimed should be) without it. Or the parties may be in disagreement as to what the practice was. Either way, exhibits may be desirable.

The written grievance processing of the case being heard is an item that arbitrators are generally interested in, the grievance as filed, the Company answers, minutes (if any) of the grievance meetings, and so on. The same may be said as to evidence of past negotiations. Both sides normally have records or memoranda of varying degrees of completeness as to such matters. They, too, often should be produced, if of course otherwise relevant.

There is much to be gained by a greater use of evidence in written (and sometimes in picture) form. For one thing, it makes for greater accuracy. Far too often much of this "background" material, so well understood by the witnesses who would testify to it, is given off the cuff with little or no advance preparation at all, with the result that what is said orally is not entirely accurate, or a wrong impression is created either by what is said or what is omitted. The very process of writing it down for later presentation in exhibit form of necessity is bound to make for greater accuracy.

And not only for accuracy, but equally important, for clarity as well. Far too often an arbitrator comes to a hearing, meeting the parties for the first time, with little or no advance information as to the issue involved, and he is met with a witness who is so close to the subject that he does not realize that the arbitrator may not be familiar with the particular industry, or the particular department, or the particular operation, indeed with the particular "lingo" that is used. In circumstances like these, the arbitrator obviously labors under a great handicap (unless at least he is a "permanent" arbitrator). How can he be convinced if he does not understand, or if he understands only imperfectly? Would it not be better to give him that background in black and white? Why expect him to rely upon his memory, or his notes, especially when there is no transcript? And even if his memory is good, or his notes excellent, indeed even if there is a transcript, will it help if he remembers what he may not

fully understand, in which event his notes or the transcript might almost as well be in Sanskrit?

I earnestly suggest, therefore, that parties put as much of the evidence as possible in black and white, as simply and plainly and logically as possible. Besides which, of course, it is well known that, everything else being fairly equal, visible evidence, evidence that *remains visible,* is often far more persuasive than evidence which one hears and may forget. This is usually the best way of "educating" an arbitrator. Moreover, it enables the arbitrator to understand the case more quickly and to write the decision faster, and this should reduce arbitration costs.

Of course, some parties do present exhibits to the extent here suggested. But most parties do not, or do not do so efficiently. It takes a bit of extra work to prepare exhibits, and it's "easier" to present the evidence orally. But the extra effort (often not much at all) pays dividends. Moreover, much of the material of this type, the "background" material especially, can be used again and again, particularly if a new arbitrator is to hear the next case.

Unless the other side is willing to accept the exhibit for what it purports to be, it may be necessary or otherwise advisable for a witness to identify the exhibit and to put in enough evidence to show its accuracy. The witness would, of course, be subject to cross-examination, and both on direct and on cross-examination he may elaborate or supplement the exhibit with some further testimony.

A few miscellaneous items about exhibits: They should each be given a title; for example, Production Flow Chart, Set Up of Machine Shop, Seniority List, Minutes of Negotiation Meeting of (such and such a date), and so on. Copies should be prepared if possible, so that you can not only give one to the arbitrator but to the other side, and so that a copy is available if briefs are to be filed, for example. Unless the arbitrator is told that he need not return exhibits filed with him, he should send them back with his decision.

I repeat, then: Put it in black and white if you can—and you usually can.

Washington, D.C.

SAMUEL H. JAFFEE
Labor Arbitrator

READINGS IN ARBITRATION

Articles and Notes in Legal Periodicals

Applicability of Contract Arbitration Clause to Another Contract [*Otis Elevator Co. v. Carney,* 6 N.Y. 2d 358], 9 De Paul L. Rev. 169-170 (1960).

Arbitration—What Is It? By Wesley A. Sturges, 35 N.Y.U. L. Rev. 1031-1047 (1960).

Aspects of Arbitration under Collective Bargaining Agreements in the New York Courts. By Samuel H. Hofstadter and Theodore B. Richter, 144 N.Y.L.J., No. 55-58, p. 4 (Sept. 19-22, 1960).

In Defense of Creeping Legalism in Arbitration. By Paul H. Tobias, 13 Ind. & Labor Rel. Rev. 596-607 (1960).

International Reciprocal Arbitration Agreement. By Bernard L. Hines, Jr., 183 Weekly Underwriter No. 11, p. 483-484 (Sept. 10, 1960).

Judicial Enforcement of Labor Contracts and Employment Rights under Pennsylvania Law. By I. Herman Stern, 5 Villanova L. Rev. 561-589 (1960).

Right of Individual Employees to Notice of Arbitration Proceedings. By Dudley W. Pierce, 1960 Wisconsin L. Rev. 324-336.

Role of Arbitration in Labor-Management Relations. By John N. Fanning, 144 N.Y.L.J. No. 119 p. 4, Dec. 22, 1960.

Scope of Review in Judicial Enforcement of Promises to Arbitrate in Collective Bargaining Agreements. Note in 36 Notre Dame Lawyer 63-68 (1960).

Section 301, Arbitration and the No-Strike Clause. By Richard A. Givens, 11 Labor L. J. 1005-1022 (1960).

State Court Pre-Empted from Enforcing Grievance Procedures of Collective Bargaining Agreement, 13 Vanderbilt L. Rev. 804-811 (1960).

State Law not Binding on Federal Court in Diversity Suit [*Robert Lawrence Co. v. Devonshire Fabrics,* 271 F. 2d 402], 9 De Paul L. Rev. 291-296 (1960).

The Development and Use of Arbitration to Settle Maritime Cases in This Country. By Arnold W. Knauth, 183 Weekly Underwriter No. 1, p. 33-36 (July 2, 1960).

The Supreme Court and Labor Law, October Term, 1959. By Paul R. Hays, 60 Columbia L. Rev. 901-935 (1960).

Voluntary Labour Arbitration in the United States. By Paul M. Herzog and Morris Stone, 82 Int. Labour Rev. 301-326 (1960).

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *The Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

UNDER THE FEDERAL ARBITRATION ACT, A WRITTEN PROVISION TO ARBITRATE A FUTURE MARITIME DISPUTE IS ENFORCEABLE, THOUGH NOT SIGNED. "It is true that under the Act, a 'written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such . . . transaction' is the *sine que non* of an enforceable arbitration agreement. . . . It does not follow, however, that under the Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. For the Act contains no built-in Statute of Frauds provision but merely requires that the arbitration provision itself be in writing." *Fisser v. International Bank,* 282 F. 2d 231 (2d Cir., Hincks, C. J.).

A PARTY CANNOT DEFEAT A RIGHT OF ARBITRATION BY NAMING AS A DEFENDANT IN AN ACTION AT LAW ONE WHO IS NOT SUBJECT TO ARBITRATION. The plaintiff contended that an action brought against his employer and a co-defendant, an accountant, for conspiracy to defraud the plaintiff was beyond the scope of the arbitration clause, since the co-defendant was not a party to the arbitration agreement. The court held the argument to be without merit. "Plaintiff cannot, by naming as a defendant one who is not subject to arbitration, defeat the right of the moving defendant to arbitration under the agreement." *Epstein v. Grover,* 21 Misc. 2d 948 (Crisona, J.).

"APPRAISAL BY ARBITRATION" HELD TO MEAN ARBITRATION. A partnership agreement providing that surviving partners should purchase the partnership interest of the deceased and that the price for the decedent's interest, if not agreed upon by the legal representative and the surviving partners, was to be fixed by "appraisal by arbitration," was held to provide for arbitration. "Otherwise, there is no reason for the inclusion of the words 'by arbitration.'" An order for the appointment of a third arbitrator was therefore affirmed. *Katz v. Schwartz,* 11 App. Div. 2d 89, 201 N.Y.S. 2d 996 (First Dept.).

COURT STAYS ARBITRATION OF DISPUTE UNDER SUPPLEMENTARY AGREEMENT WHERE ARBITRATION CLAUSE WAS NEITHER IN THE DOCUMENT NOR INCORPORATED BY REFERENCE. A deferred compensation agreement was entered into between respondent as general manager and the corporation he was to work for. This deferred compensation agreement did not contain an arbitration clause and the employment contract itself made no mention of the deferred compensation agreement. Therefore the court held respondent was not entitled to arbitration of disputes arising out of such agreement. *Application of H. D. Baskind & Co.*, 203 N.Y.S. 2d 701 (Aurelio, J.).

APPLICATION OF FRAUD IN THE INDUCEMENT OF A CONTRACT HELD NOT ARBITRABLE. On a motion to stay arbitration the respondent argued that where a contract has been made, arbitration must be ordered even though the contract is claimed to have been cancelled by the acts of the parties and even though one party has so acted as to give grounds for the rescission thereof. The court said: "Such contention would be valid if the rescission were based upon a breach of the contract occasioned by the acts committed subsequent to the execution of the valid contract. The acts [here] were acts precedent to the execution of the agreement which prevented a valid contract from arising." *Application of Grossman*, 203 N.Y.S. 2d 393 (McDonald, J.).

ARBITRATION OF "ALL DISCREPANCIES WHICH MIGHT EVENTUALLY ARISE FROM THIS CONTRACT" DOES NOT COVER A DISPUTE INVOLVING REPUDIATION OR RESCISSION OF THE CONTRACT BEFORE DELIVERY. In denying a petition to compel arbitration under the Federal Arbitration Act the court found as a matter of law that the dispute over repudiation of a contract which was never performed was not arbitrable. The court concluded that the clause submitting to arbitration "all discrepancies which might eventually arise from this contract" is "restrictive and does not cover a dispute arising prior to performance of the contract. The word 'discrepancies' does not indicate clearly the scope of the arbitration clause. Respondents should not be forced to submit to arbitration a dispute they did not intend to submit." *I. S. Joseph Co. v. Golde*, 185 F. Supp. 521 (D. Minn., Devitt, C. J.).

THE COURT RATHER THAN ARBITRATORS DETERMINES WHETHER A CONTRACT IS VOID FOR LACK OF MUTUALITY. Said the court: "The arbitration clause and the right to proceed under it are necessarily grounded upon the existence of a valid agreement. If the agreement is non-existent, the arbitration clause therein contained, not standing apart as an independent agreement, is perforce ineffective. . . . Distinguishable are all the cases where the attack is not as to the existence of an agreement but is upon the conduct or transactions which amount to a breach of the agreement in nonperformance due to fraud, permitting its termination . . . or rescission of sale (not rescission of the agreement) due to breach of agreement." *Application of Loewy*, 204 N.Y.S. 2d 231 (Loreto, J.).

II. THE ARBITRABLE ISSUE

WHETHER DEMAND IN A COMMERCIAL ARBITRATION IS FRIVOLOUS OR NOT IS FOR THE ARBITRATOR TO DECIDE. The court cited the recent decision in *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (digested in *Arb. J.* 1960, p. 149), where the U.S. Supreme Court said: "The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even *frivolous* claims may have therapeutic values. . . ." *Application of Rosenthal-Block China Corp.*, 204 N.Y.S. 2d 238, affirmed 205 N.Y.S. 2d 502 (1st Dept.).

DISPUTES OVER TERMS OF SEPARATION AGREEMENT HELD ARBITRABLE. The facts warranted the appointment of an arbitrator to determine the annual income of the husband and whether any adjustments in payment should be made in accordance with the separation agreement. *Epstein v. Epstein*, 23 Misc. 2d 1067 (Gulotta, J.).

EDUCATION AND TUITION PAYMENTS OF CHILDREN HELD ARBITRABLE. Petitioner made a motion to vacate an arbitration award concerning the education of the son of the parties. The court distinguished the decision in *Matter of Michelman*, 5 Misc. 2d 570, on the grounds that the latter case dealt with rights of custody and visitation, ". . . and not the issue of the selection of a school and the payment of tuition thereof." *Freidberg v. Freidberg*, 23 Misc. 2d 196 (McGivern, J.).

STAY OF ARBITRATION GRANTED WHERE DEMAND CLEARLY EXCEEDED THE SCOPE OF THE ARBITRATION PROVISION. In reversing an order compelling arbitration, the court found that an examination of the papers ". . . reveals that substantially more than revision of salary rates is involved, and some of the demands lack specificity. The appellant is entitled to a list of specific demands within the language of the contract. From the demands listed they clearly exceed the scope of the arbitration provision and, by the language of the contract, are not arbitrable." *Film Producers Association of New York, Inc. v. Screen Directors Int'l Guild*, 202 N.Y.S. 2d 382 (1st Dept. 1960).

AGREEMENT TO ARBITRATE FUTURE LABOR DISPUTES AFFORDS INSUFFICIENT BASIS FOR ARBITRATION, where the union and the employer had not executed a full-length collective bargaining agreement. The employer argued that, since it never executed the collective bargaining agreement, there was no valid agreement to arbitrate, although a prior agreement between the parties had been executed, which agreement contained an arbitration clause. *Luggage Workers Union, Local 60, ILGP & NWU v. Major Moulders Inc.*, 11 App. Div. 668, 202 N.Y.S. 2d 358 (1st Dept. 1960).

DISPUTE AS TO WHETHER COMPANY WAIVED REQUIREMENT OF FILING WRITTEN COMPLAINT WITHIN 48 HOURS AFTER A DISCHARGE HELD QUESTION FOR THE ARBITRATOR AND NOT THE COURTS TO DECIDE. ". . . the effect of the alleged waiver, being a matter subsequent to the making of the contract, lies exclusively within the jurisdiction of the arbitrators." *Straight Line Foundry & Machine Corp. v. Wojcik,* 204 N.Y.S. 2d 29 (Lockwood, J.).

DISCHARGE OF UNION EMPLOYEE HELD ARBITRABLE WHERE COLLECTIVE BARGAINING AGREEMENT FORBADE DISCRIMINATION AGAINST EMPLOYEES ON ACCOUNT OF MEMBERSHIP IN ANY LABOR UNION. *Gulf Oil Corp. v. Int'l Union of Operating Engineers, Local No. 715,* 279 F. 2d 533 (Fifth Cir., Hutcheson, C. J.).

WHETHER A BONA FIDE DISPUTE EXISTS SO AS TO PERMIT ARBITRATION IS A QUESTION OF LAW FOR THE COURTS TO DECIDE. Said the court: "It is well established that a contractual provision to arbitrate disputes does not permit a party to the contract to compel arbitration of a contention which is clearly contrary to the provisions of the contract and for which no reasonable basis exists." *Application of National Broadcasting Co.,* 202 N.Y.S. 2d 534 (Gold, J.).

CLOSING DOWN OF PLANT FOR INSUFFICIENT BUSINESS HELD NOT ARBITRABLE ISSUE where employer gave adequate reasons to the union and the employees also were given ample opportunity for employment at another plant. In granting the stay of arbitration requested by the employer the court distinguished the recent Supreme Court decisions of *United Steelworkers of America v. American Manufacturing Co.,* 363 U.S. 564, and *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (digested in *Arb. J.* 1960, p. 149), holding them "not applicable here for the reason that although the alleged dispute may fall within the literal language of the agreement, if there is no real ground of claim the court may refuse to allow arbitration." The stay of arbitration was therefore granted. *Application of Fownes Bros. & Co.,* 204 N.Y.S. 2d 998 (Montgomery County, Aulisi, J.).

CONTRACTING OUT OF MAINTENANCE WORK HELD NOT ARBITRABLE WHERE PARTIES KNEW THAT SAID POLICY WAS IN FORCE AND WAS EXCLUDED FROM ARBITRATION. The court, in comparing the facts to the Supreme Court decision in *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (digested in *Arb. J.* 1960, p. 149), found that in the latter case the exclusions from arbitration were very vague while in the facts under consideration, the evidence established that "contracting out of maintenance work was a policy of the respondent; . . . the written contract permitted the Company to exercise and continue such policy; and . . . the same was not arbitrable but was specifically excluded from the scope of arbitration." *Local No. 725, Int'l Union of Operating Engineers v. Standard Oil Co. of Indiana,* 186 F. Supp. 895 (D. C. North Dakota, Register, Ch. J.).

DISPUTE OVER SEVERANCE OF EMPLOYEES BY PENSION COMMITTEE IS NOT ARBITRABLE WHERE THE COLLECTIVE BARGAINING AGREEMENT called for arbitration of "discharge" grievances. The court differentiated between a "discharge" and a "retirement," finding that the action of severing employees from work because of age was not the type of grievance which was meant to be the subject of the arbitration clause. *Int'l Telephone & Telegraph Corp. v. Local 400, Professional, Technical & Salaried Div., Int'l Union of Electrical, Radio & Machine Workers, AFL-CIO,* 184 F. Supp. 866 (D.C. N.J., Meany, D. J.).

QUESTION OF FILLING VACANCY IN ACCORDANCE WITH COLLECTIVE BARGAINING AGREEMENT HELD ARBITRABLE, The Appellate Division, reversing an order which had stayed the arbitration proceedings, held the question as to whether or not a vacancy was to be filled in accordance with the collective bargaining agreement in the light of past practices and arbitration decisions between the parties, was clearly one for arbitration. *Matter of Rollway Bearing Co.,* 11 App. Div. 2d 753, 201 N.Y.S. 2d 648 (Fourth Dept.).

UNION WAS ENTITLED TO AN ORDER COMPELLING ARBITRATION EVEN THOUGH DISPUTE CONCERNED WALKING OFF THE JOB IN DIRECT VIOLATION OF THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT. Said the court: "To hold that a grievance, to be arbitrable, may not constitute a violation of some clause of the collective bargaining agreement would render an arbitration provision completely abortive." *Int'l Moulders & Foundry Workers Union of North America, Local No. 239, AFL-CIO v. Susquehanna Casting Co.,* 184 F. Supp. 543 (M.D. Pa., Follmer, D. J.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

UNION MAY NOT COMPEL ARBITRATION OF GRIEVANCES AGAINST RECEIVER AS NEW EMPLOYER UNDER THE ORIGINAL COLLECTIVE BARGAINING AGREEMENT. The union claimed the receiver was operating the same hotel business and must therefore respect the existing labor contract. The court said: "A provisional receiver is born by order of the court. . . . He may affirm or reject the rights and obligations of the interest he is caretaking, and it would be inconsistent to compel arbitration . . . against him on obligations antedating his creation." *Riker (as Pres. of Bartenders & Hotel & Restaurant Employees Union, Local 164, AFL-CIO) v. Browne,* 204 N.Y.S. 2d 60 (Barron Hill, J.).

PENNSYLVANIA COURT GRANTS PRELIMINARY INJUNCTION TO PRESERVE STATUS QUO PENDING ARBITRATION. Defendant had contracted in his employment not to disclose confidential information gained in his employment by the plaintiff, and further not to compete in business within a 100 mile radius for two years following the termination of his employment. Defendant resigned his position to join a competitor of the plaintiff which operated in the same territory. The contract called for arbitration of

any disputes arising thereunder, but since there are no provisional remedies available in arbitration, plaintiff sought temporary relief in court. The court said: "No case has been cited, and no situation suggested, in which arbitrators have had the power to grant temporary relief such as is required of a court of equity where imminent danger of irreparable harm appears to make it necessary to preserve rights from threatened invasion." A decree granting a preliminary injunction for the purpose of preserving the status quo was therefore affirmed. *American Eutectic Welding Alloys Sales Co. v. Charles Flynn,* Supreme Court of Pennsylvania (Eastern District) No. 257, June 3, 1960, Jones, C. J.

WHERE CONTRACT CONTAINS A BROAD ARBITRATION CLAUSE, A REQUEST FOR RESCISSION OF THE CONTRACT BASED UPON FRAUD IN THE INDUCEMENT WILL BE LEFT FOR DETERMINATION OF THE ARBITRATORS. A contract for sale of textile piece goods contained a clause stating that "any controversy arising under or in relation to this contract or order or any modification thereof shall be settled by arbitration." The Court distinguished the case of *Matter of Wrap-Vertiser,* 3 N.Y. 2d 17, 163 N.Y.S. 2d 639, on the grounds that in the latter the arbitration clause was so narrow in scope that "the question of fraudulent inducement was not allowed to come within its purview." If such distinction was not made, said the court, "a bare allegation of fraud in the inducement in any action would be sufficient to defeat every arbitration." *Fabrex Corp. v. Winard Sales Co.,* 23 Misc. 2d 26, 200 N.Y.S. 2d 278 (Lupiano, J.).

ARBITRATION MAY NOT BE STAYED WHERE WITNESSES WHO WERE MEMBERS OF THE DEFENDANT UNION WERE ALLEGED TO HAVE BEEN TAMPERED WITH OR SUBJECTED TO UNDUE INFLUENCE. In denying the motion to stay arbitration the court said: "No authority is urged in support of the proposition that a hearing before an arbitrator may be stayed or that the grievance and trial thereof are waived upon the ground urged any more than the litigants in an action pending in this court may be deprived of the right to prosecute the claim or defense by reason of claimed tampering with witnesses. The witnesses are available to the petitioner and if they are hostile for any reason the means are also available to expose such hostility and alleged undue influence." *WMCA, Inc. v. Radio and Television Broadcast Engineers' Union, Local 1212, Int'l Bro. of Electrical Workers, AFL-CIO,* 23 Misc. 2d 1014 (Gold, J.).

ACTION BY UNION FOR DAMAGES FOR ALLEGED BREACH OF ARBITRATION AND UNION SECURITY CLAUSES IN COLLECTIVE BARGAINING AGREEMENT DENIED where evidence supported finding of employer that the employee, whose union membership had been suspended prior to his being hired, could not obtain membership in the union on conditions generally available to others. The court found that the employer did not breach the union's security clause by not discharging the employee under these circumstances. *Local Lodge No. 1898 of Dist. No. 38, Int'l Ass'n of Machinists, A.F.L. v. Brake & Electric Sales Corp.,* 279 F. 2d 590 (1st Cir., Hartigan, C. J.).

ILLINOIS COURT HOLDS FUTURE ARBITRATION AGREEMENT UNENFORCEABLE UNDER COMMON LAW DOCTRINE OF THAT STATE. The by-laws of the American Federation of Musicians provide for a grievance procedure in case of disputes. Plaintiff by-passed this grievance procedure and sued defendant manufacturer for damages. Defendant argued that grievances had to be arbitrated as the sole exclusive remedy under the contract. The court held that any such agreement amounted to "compulsory arbitration" and was therefore not enforceable in Illinois. *Hill v. Mercury Record Corp.*, 168 N.E. 2d 461 (Ill. App., McCormick, J.).

ON MOTION TO COMPEL ARBITRATION OF LABOR DISPUTE, COURT'S FUNCTION IS LIMITED TO ASCERTAINING WHETHER CLAIMANT IS MAKING A CLAIM WHICH IS BASED ON THE CONTRACT. In a dispute on lay-off after pregnancy leave of absence the court, referring to the Supreme Court decisions of June 20, 1960 (digested in *Arb. J.* 1960, p. 149) directed arbitration, in stating: "In the present uncertain state of the law, it seems wisest to submit the grievances to the arbitrators, who will consider the history of the collective bargaining along with the other evidence in determining whether the Union's claim is supported by the provisions of the Agreement." *Maryland Telephone Union v. Chesapeake & Potomac Telephone Co. of Md.*, 187 F. Supp. 101 (D. Md., Thomsen, Ch. J.).

FEDERAL COURT MAY ONLY DETERMINE WHETHER GRIEVANCE DISPUTE CONCERNS INTERPRETATION OR APPLICATION OF THE CONTRACT. "And this is so even though we may think the contract can be correctly interpreted only one way. Thus, upon application of either party. it would be the limited function of the court to enforce the agreement to arbitrate in accordance with the usual process of the law." *Chauffeurs, Teamsters and Helpers Local Union No. 795 v. Yellow Transit Freight Lines*, 282 F. 2d 345 (Tenth Cir., Murrah, Ch. J.).

ON A MOTION TO COMPEL ARBITRATION THE COURTS DO NOT CONSIDER THE MERITS OF THE DISPUTE. Said the court: "The merits of a suit to compel arbitration, of course, do not include the determination (1) of the underlying facts and (2) what the ultimate outcome of the controversy will be. These, if the matter is arbitrable, are for the determination of the arbitrator. What and all that we must pass on here is the correctness of the district court's determination that an arbitrable controversy is presented." *Gulf Oil Corp. v. Int'l Union of Operating Engineers, Local No. 715*, 279 F. 2d 533 (Fifth Cir., Hutcheson, C. J.).

UNDER SECTION 301 OF THE TAFT-HARTLEY ACT COURTS HAVE THE DUTY TO DETERMINE WHETHER A UNION HAS BREACHED ITS PROMISE TO ARBITRATE. "The arbitration of grievances filed by union members over disciplinary action taken by the company as a result of the alleged strike involves issues quite distinct from the issue whether the union violated its contract." Therefore a motion to stay the court proceedings brought against the union for breach of the agreement was denied. *Sinclair Refining Co. v. Atkinson*, 187 F. Supp. 225 (N.D. Indiana, Swygert, Ch. J.).

FEDERAL COURT APPLYING FEDERAL SUBSTANTIVE LAW STAYS PROCEEDINGS PENDING ARBITRATION WHERE CONTRACT INVOLVED INTERSTATE COMMERCE. The contract called for arbitration in Chicago, ". . . pursuant to the Arbitration Laws of the State of Illinois . . ." This state has no statute making future arbitration agreements enforceable. Respondent brought suit for breach of the contract and petitioner moved to stay the proceedings pending arbitration, claiming the Federal Arbitration Act was applicable. The court held that a contract which provides for supplying of material to a country-wide industry ". . . evidences a transaction involving 'commerce' . . ." and granted the stay under arts. 2 and 3 of the Federal Arbitration Act. *Kirschner v. West Company,* 185 F. Supp. 317 (E.D. Pa., Goodrich, C. J.).

FEDERAL COURT GRANTS INJUNCTIVE RELIEF PENDING ARBITRATION OF LABOR DISPUTE. In determining whether the court had the right to grant injunctive relief in view of the categorical language of the Norris-LaGuardia Act, restricting the jurisdiction of federal courts to issue an injunction in a labor dispute case, the court said: "In the light of the declaration of the Supreme Court in *General Electric Co. v. Local 205,* 353 U.S. 547 (1957), that 'the Norris-LaGuardia Act does not bar the issuance of an injunction to enforce the obligation to arbitrate grievance disputes' it is difficult to believe that with the power to direct specific performance the court is not also empowered to issue an injunction to prevent acts designed to frustrate the mandate of the court." *Johnson & Johnson v. Textile Workers Union,* 184 F. Supp. 359 (D.C. N.J., Meany, D. J.).

COURT DETERMINES WHETHER CONDITIONS PRECEDENT TO ARBITRATION HAVE BEEN COMPLIED WITH. Whether contractor complied with requirement of presenting claims against a municipal corporation within prescribed time is an issue for court determination in a proceeding to stay arbitration under a building contract. *Board of Education, City School District of New Rochelle v. Bernard Associates #3, Inc.,* 206 N.Y.S. 2d 140 (Second Dept.).

EMPLOYER COULD NOT OBTAIN STAY OF ARBITRATION WHERE HE DID NOT QUESTION THE VALIDITY OF THE CONTRACT UNTIL ARBITRATION WAS DEMANDED AND HE HAD ACCEPTED ALL THE BENEFITS UNDER THE CONTRACT. *East Meadow Sanitation Service, Inc. v. Adelstein,* 202 N.Y.S. 2d 735 (Sup. Ct. 1958).

MOTION TO STAY ARBITRATION OF UNINSURED MOTORIST CLAIM GRANTED WHERE INSURER WOULD BE BARRED BY STATUTORY TIME LIMIT FROM RIGHT OF SUBROGATION. An accident occurred in July, 1956; the demand for arbitration was dated April 1960. Since the underlying claims against the owner and operator of the uninsured motor vehicle in which the insurer had a right of subrogation were time barred, the court granted the motion to stay arbitration of the injured person's claim. *Security Ins. Co. v. Rogers,* N.Y.L.J., Oct. 4, 1960, p. 14 col. 2 (Tilzer, J.).

APPLICATION TO COMPEL ARBITRATION OF UNINSURED MOTORIST CLAIM GRANTED DESPITE LAPSE OF THREE-YEAR PERIOD NORMALLY APPLICABLE TO TORT ACTIONS. Petitioner sought to compel arbitration under an automobile policy provision for benefits on account of bodily injury or death caused by an uninsured motorist. The injury occurred in March 1956 and on May 28, 1959 claimant made his demand for arbitration, stating that the respondent insurance company had refused to submit thereto. Respondent relied upon the three-year statute of limitations, sec. 49, N.Y. C.P.A., applicable to torts. In granting the motion to compel arbitration the court said the claim "is based not upon tort but upon the insurance contract, although a tortious act of a third party gives rise to the rights under the contract. The claim being made in contract the three-year Statute of Limitations is not applicable." *Ceccarelli v. Travelers Indemnity Co.*, 204 N.Y.S. 2d 550 (McDonald, J.).

IV. THE ARBITRATOR

WHERE ONE OF THREE ARBITRATORS DISCLOSED PRIOR BUSINESS DEALINGS WITH ONE OF THE PARTIES AND WHERE SERVICE AS ARBITRATOR WAS ACCEPTED WITHOUT FURTHER INVESTIGATION, THE FACT OF PRIOR BUSINESS DEALINGS CANNOT BE ASSERTED TO VACATE THE AWARD. On a motion to confirm the award, the court denied a cross-motion to vacate the award, saying: "The counsel for the respondent made no effort to ascertain the extent of the business which had been done by the third arbitrator with the petitioner, as he could have done, and chose to accept the third arbitrator without further investigation." *Knickerbocker Textile Corp. v. Henry Donath,* 22 Misc. 2d 1056, 205 N.Y.S. 2d 408; aff'd 282 App. Div. 680, appeal den. 282 App. Div. 836.

THE PROVINCE OF THE ARBITRATOR SHOULD NOT BE LIMITED OR INTRUDED UPON BY A COURT. The company argued that if the court would compel it to arbitrate disputes under the collective bargaining agreement, then the court should delineate the precise issues to be determined. The court declined to limit the scope of the arbitrator's authority, holding that such would be against "the more advanced thinking on arbitration." *Retail Shoe & Textile Salesmen's Union, Local 410, RCIA, AFL-CIO v. Sears, Roebuck & Co.*, 185 F. Supp. 558 (N.D. Calif., Harris, D. J.).

THE FACT THAT ARBITRATORS DO NOT HAVE THE AUTHORITY TO DETERMINE THE TITLE TO REAL PROPERTY, DOES NOT PREVENT THEIR DETERMINATION OF THE VALUE OF ASSETS OF A CORPORATION EVEN THOUGH REAL PROPERTY IS INCLUDED AMONG THOSE ASSETS. Determination of the value of the stock of a corporation is not primarily concerned with the rights and obligations of the parties under the contract and is not a "controversy respecting the claim to an estate in real property . . . within the meaning of the provisions of Civil Practice Act, sec. 1448, subd. 2, as would bar arbitration." *In re Zuber's Estate,* 202 N.Y.S. 2d 931 (Dutchess County, Eager, J.).

ILLINOIS COURT HOLDS ARBITRATORS MAY NOT AGREE TO TERMINATE THE ARBITRATION BEFORE AN AWARD IS MADE. Said the court: "The arbitrators, having accepted appointment, were bound by its terms. It is hardly conceivable that the parties intended a situation which would permit the arbitration agreement to be terminated or nullified by the arbitrators, without notice to or the consent of the parties." *West Towns Bus Co. v. Div. 241, Amal. Ass'n of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO,* 168 N.E. 2d 473 (Ill. App., Murphy, J.).

AWARD UPHELD ALTHOUGH ARBITRATOR HAD SOME BUSINESS DEALINGS WITH ONE PARTY. Said the court: "The . . . relationships between the arbitrator and the petitioner were of a casual business character and virtually inescapable under a system of arbitration where arbitrators are purposely chosen for their familiarity with the industry." *Weavercraft, Inc. v. Mil-Jay,* 22 Misc. 2d 1054, 205 N.Y.S. 2d 545 (Breitel, J.).

ABSENCE OF AN ARBITRATOR FROM THE HEARING IS GROUNDS FOR VACATING THE AWARD. Said the court: "It is the rule that all arbitrators must act and act together. All must be present, or shall be given an opportunity to be present, at each and every meeting equally, whether the meeting be for the hearing of evidence, arguments of the parties, or for consultation or determination of the award. This is so, even when it is stated in the agreement of submission that a majority award shall be valid." *West Towns Bus Co. v. Div. 241, Amal. Ass'n of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO,* 168 N.E. 2d 473 (Ill. App., Murphy, J.).

ALL QUESTIONS CONCERNING THE EXHAUSTION OF GRIEVANCE PROCEDURES ARE FOR THE ARBITRATOR TO DETERMINE where the collective bargaining agreement provides for arbitration of all disputes involving questions of interpretation or application of any clauses of the agreement. *Philadelphia Dress Joint Board of the Int'l Ladies' Garment Workers' Union v. Sidele Fashions, Inc.,* 187 F. Supp. 97 (E.D. Pa., Van Dusen, D. J.).

V. THE PROCEEDINGS

DEMAND FOR ARBITRATION DOES NOT HAVE TO BE SIGNED PERSONALLY BY INITIATING PARTY when the arbitration is in accordance with the rules of the American Arbitration Association. The Association's rules provide that a demand signed and filed by an attorney for the demanding party is acceptable. *In re Zuber's Estate,* 202 N.Y.S. 2d 931 (Dutchess County, Eager, J.).

COURT MAY NOT REMOVE AN ARBITRATOR PRIOR TO THE AWARD. In affirming an order of the Supreme Court, which denied an application to have the office of arbitrator declared vacant, the court said: "The application to replace the chairman of the arbitration panel was premature under the authority of *Matter of Franks (Penn-Uranium Corp.),* 4 App. Div. 2d 39. *Western Union Tel. Co. v. Selly,* 295 N.Y. 395, is not to the

contrary. The court there having appointed the arbitrator had the inherent power to remove him especially since the formal arbitration hearings had not yet been commenced." *Ballantine Books, Inc. v. Capital Distributing Co.*, 11 App. Div. 2d 933 (First Dept.).

ARBITRATORS' INDEPENDENT INVESTIGATION OF DISPUTED GOODS WITHOUT PARTIES' KNOWLEDGE NOT PERMISSIBLE. After the hearing, two of the three arbitrators personally tested a sample of the goods which were the subject of the arbitration without the knowledge of the parties. On the basis of this test they determined that the goods were of a normal run-of-the-mill quality despite contrary evidence, given at the hearing, of a test made by the Better Fabrics Testing Bureau. The award was therefore vacated. *Dukraft Mfg. Co. v. Bear Mill Mfg. Co.*, 22 Misc. 2d 1057 (McNally, J.).

REFUSAL OF AN ARBITRATOR TO GRANT AN ADJOURNMENT DOES NOT AMOUNT TO A VIOLATION OF DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION. On appeal from a court order confirming an arbitration award in 8 N.Y. 2d 720, 201 N.Y.S. 2d 100 (digested in *Arb. J.* 1960, p. 156), there was presented a question under the Constitution of the United States, viz: that appellant's right to due process of law under the Fourteenth Amendment to the Constitution was denied by the alleged refusal of the arbitrator to grant it an adjournment. The Court of Appeals held there was no such denial. *Golodetz v. Timblo Irmaos Limitada*, 8 N.Y. 2d 910, 204 N.Y.S. 2d 151.

ARBITRATORS MAY RECEIVE LETTERS AS EVIDENCE RATHER THAN PERSONAL TESTIMONY. Receiving letters from textile salesmen as evidence is within the discretion of arbitrators, "both under the general rules of law applicable to arbitrations and also under the rules of the American Arbitration Association under which the submission here was made." *Weavercraft, Inc. v. Mil-Jay*, 22 Misc. 2d 1054, 205 N.Y.S. 2d 545 (Breitel, J.).

PARTICIPATION IN ARBITRATION PROCEEDINGS WAIVES ALL DEFECTS. The plaintiffs asserted that during the arbitration proceeding they discovered what they now allege to be fraud in the inducement of the contract. The court said: "However, in spite of this so-called new knowledge, the plaintiffs continued to fully participate in the proceedings instead of availing themselves of the remedies provided for in sections 1458 and 1462 of the Civil Practice Act. Under these circumstances they may not now in effect attack through an amendment of their complaint." *Horowitz v. Alley Pond Park Apartments No. 1, Inc.*, 205 N.Y.S. 2d 554 (Martuscello, J.).

VI. THE AWARD

WHERE STATUTE REQUIRES AN AWARD TO BE ACKNOWLEDGED, FAILURE TO DO SO WILL NULLIFY THE AWARD. "The fact that acknowledgment is required by statute plainly indicates that to give validity to the award the arbiter must not only sign it but he must also place it out of his power to recall it or alter it." Moreover, the award must be rendered within the time specified by the contract or the award is a nullity. *Rusnak v. General Controls Co.*, 7 Cal. Rptr. 71 (Cal. App. 2d Dist. Div. 3, Shinn, P. J.).

COURT WILL NOT REVIEW ANY QUESTIONS OF FACT OR LAW AS DETERMINED BY AN ARBITRATOR. In a dispute as to whether an employee who became ill in a holiday week was entitled to an additional day's pay, the arbitrator's decision awarding an additional day's pay was challenged as modifying the contract and thereby outside his power. Said the court: "Once referred to him, all questions of fact and of law are within the judicially unreviewable purview of the arbitrator." *Great A. & P. Tea Co. v. Local 484, American Bakery & Confectionery Workers*, 23 Misc. 2d 1069, 202 N.Y.S. 2d 373 (Hecht, J.).

WHERE COLLECTIVE AGREEMENT PROVIDES FOR ARBITRATION OF DISPUTES, SUCH REMEDY IS EXCLUSIVE AND COURT HAS NO JURISDICTION TO EXAMINE MERITS OF THE FINDINGS MADE BY SUCH TRIBUNAL. "The Court has jurisdiction to review a decision of a System Board [of Adjustment] only in a limited area where the complaint asserts gross discrimination, fraud, corruption, lack of jurisdiction and like matters." *Rossa v. Flying Tiger Line, Inc.*, 187 F. Supp. 386 (N.D. Ill., Igoe, D. J.).

ARBITRATORS MAY AWARD DAMAGES UPON DETERMINING THERE WAS A BREACH OF CONTRACT DESPITE THE FACT THAT THE SUBMISSION WAS SILENT ON THIS ISSUE. Said the court: "No useful purpose would be served in such a case by limiting the arbitrators to determining that there had been a breach of contract, and then relegating the parties to a new proceeding to fix damages." *Case v. Alperson*, 181 A.C.A. 871 (Cal. App. 2d Dist., Bishop, J.).

AWARD DIRECTING EMPLOYER TO PAY CONTRIBUTIONS OUT OF HIS TOTAL PAYROLL (WHICH INCLUDED NON-UNION WORKERS) TO THE UNION'S HEALTH, WELFARE AND RETIREMENT FUNDS UPHELD. The employer contended that the award directing this payment would be illegal, violating sec. 302(a) of the Taft-Hartley Act, because non-union members would receive no benefit from the funds. The court said: "The fact that the [non-union] employees . . . cannot share in the payments based on their payrolls which [the employer] has agreed to make does not give [the employer] the right to avoid its agreement as illegal." *Kreindler (as Financial Secretary of Blouse & Waistmakers Union, Local 25, ILGWU) v. Clarise Sportswear Co.*, 184 F. Supp. 182 (S.D. N.Y., Dimock, D. J.).

CALIFORNIA COURT VACATES AWARD WHERE ARBITRATOR ACTED BEYOND THE SCOPE OF A SUBMISSION IN A DISPUTE ON CONSULTING SERVICES. "While every intendment of validity must be given an arbitration award, . . . it is well settled that an arbitrator derives his power from the arbitration agreement and he cannot exceed his derived power." *William B. Logan & Associates v. Monogram Precision Industries, Inc.*, 7 Cal. Rptr. 212 (Dist. Ct. of Appeal, First Dist., Div. 2, Calif.).

ARBITRATION AWARD REDUCED TO JUDGMENT IS REGARDED IN ALL ASPECTS AS A JUDGMENT IN AN ACTION AT LAW. It is therefore subject to all provisions of law relating to judgments. Therefore, where the only basis of possible recovery was alleged fraud and at a trial of framed issues it was found that no fraud had been perpetrated, no basis for the action remained and summary judgment was granted. *Horowitz v. Alley Pond Park Apartments No. 1, Inc.*, 205 N.Y.S. 2d 554 (Martuscello, J.).

ARBITRATION AWARD MAY EXCEED CONTRACT PRICE UPON FINDING THAT REQUIREMENT OF WRITTEN ORDERS FOR CHANGES HAD BEEN WAIVED. An award granted an architect more than the contract price for his work. The owner sought to vacate the award on the grounds that the arbitrator had exceeded his powers. Said the court: "Provisions in a written contract requiring written orders for changes in the work or for extra work may be waived by the parties so that the owner becomes liable for changes or extras done by oral direction. . . . Here, the arbitrators specifically found that the requirement of written orders had been waived." *Von Langendorff v. Riordan,* 163 A. 2d 100 (Sup. Ct. of Errors, Conn., Shea, J.).

DECISION OF ARBITRATORS IS FINAL AND BINDING ON THE PARTIES AND A SUBSEQUENT ACTION ON THE SAME SUBJECT MATTER IS BARRED BY THE DOCTRINE OF RES JUDICATA. Plaintiff brought action against a religious society seeking restoration to his office of president and for injury to his reputation and feelings. The court action was dismissed by agreement of the parties and the matters were submitted to arbitration without restrictions or conditions, including all questions of law and fact. "The decision of the arbitrators upon the subject matter was therefore binding and conclusive upon them." *Louison v. Fischman,* 168 N.E. 2d 340 (Supr. Jud. Court of Mass., Williams, J.).

CONFIRMATION OF AN AWARD CANNOT BE DENIED ON THE ALLEGATION OF MISCONDUCT OF THE ARBITRATORS IN THAT THEY REFUSED TO HEAR CERTAIN EVIDENCE. Said the court: "There was sufficient proof for the arbitrators to determine the insurance, storage and trucking charges and the proof was not vitiated in the least because the arbitrators ex parte confirmed the amounts. Where evidence is gathered ex parte and is merely confirmatory of earlier testimony upon which the arbitrators were warranted in basing their award, there is no misconduct." *Dessy-Atco, Inc. v. Youngset Fashions, Inc.*, 205 N.Y.S. 2d 577 (Amsterdam, J.).

PROVISIONS OF FEDERAL ARBITRATION ACT AUTHORIZING MODIFICATION AND CORRECTION OF AWARDS ARE DISCRETIONARY WITH THE COURTS AND NOT MANDATORY. The modification section of the Act "is not mandatory, as are the New York (Civil Practice Act, sec. 1462-a) and New Jersey (N.J.S.A. section 2A:24-9) statutes from which it is taken. Rather, it invokes the discretion of the district court to modify and correct the award so as to effect its intent and promote justice between the parties." *Sociedad Armadora Aristomenis Panama, S.A., v. Tri-Coast Steamship Co.*, 184 F. Supp. 738 (S.D. N.Y., Herlands, D. J.).

PRIOR ARBITRATION AWARD, NOT REDUCED TO JUDGMENT, MUST BE PLEADED IN SUBSEQUENT ACTION BETWEEN THE PARTIES IN ORDER TO INVOKE DOCTRINE OF RES JUDICATA. In a suit to determine the value of work done under a construction contract the owner argued that a prior arbitration award was a bar to the suit, as the matter was res judicata. The court said this argument was "untenable since the award was never pleaded as such and the request to amend so as to include it came late enough in the trial that the referee was justified in denying it, but it certainly represents evidence which was admitted and should have been considered by the referee." *La Rose v. Backer*, 203 N.Y.S. 2d 740 (App. Div. Third Dept., Reynolds, J.).

COURT WILL NOT ENFORCE AWARD MADE BY ARBITRATORS WHO RELIED SOLELY ON PROOF SUBMITTED BY ONE PARTY AND FAILED TO MAKE SUFFICIENT EFFORT TO OBTAIN EVIDENCE FROM THE OTHER SIDE. The award was vacated because of "imperfect execution of power in awarding upon a record which contains proof upon one side only and in support of the side offering it. . . . This is not a matter of reviewing the amount or nature of the testimony, but rather of an award based on evidence of one side only." *Flotill Products, Inc. v. Buitoni Foods Corp.*, 203 N.Y.S. 2d 775 (Aurelio, J.).

INDEX TO VOLUME 15, 1960

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